

1987

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Publication: *Virginia Law Review*

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VIRGINIA LAW REVIEW

VOLUME 73

FEBRUARY 1987

NUMBER 1

SIMPLIFYING SUBPOENA LAW: TAKING THE FIFTH AMENDMENT SERIOUSLY

*Robert P. Mosteller**

THE purpose of this article is to simplify fifth amendment analysis regarding subpoenas for documents and tangible objects.¹ The law in this area is extraordinarily complicated and conflicting, and the lower courts have had great difficulty applying it with consistency. Even more troubling is the largely arbitrary and irrelevant nature of the inquiry required under accumulated precedent. The standards courts have been directed to apply in considering the validity of official demands for documents bear little if any relation to the substantive concerns of the fifth amendment.

Examples of this divergence between the current status of subpoena law and the fifth amendment foundations on which it rests are numerous. In determining the validity of a subpoena for documents under the fifth amendment, a court may be required to consider whether the paper on which the document was written was

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¹ Although issues in this area arise in different contexts, they are primarily litigated through enforcement of a subpoena duces tecum issued by a grand jury or a summons issued by the IRS. The principles discussed in this article will apply to other types of governmental demands for production of documents and tangible objects, but for the sake of simplicity, it will generally refer only to subpoenas. Similarly, while the demand may also include tangible objects, this article will typically refer only to documents.

purchased by the business that employs its author, whether its contents pertain to business or personal matters, and whether that business, regardless of size, is organized as a corporation or a sole proprietorship. In other circumstances, the court must decide whether a partnership is made up of individuals who are related by blood or marriage or of unrelated persons, and whether it is organized for a single venture or for general purposes. Where a third party holds the documents, the court's decision may turn on such fine distinctions as whether he is an employee of the defendant or an independent contractor, whether he has the right to use the documents or merely to store them, whether he has treated them confidentially or made them accessible to others, and whether he has possessed them for a lengthy period or only a short interval. These inquiries have virtually no relationship to any substantive fifth amendment doctrine.

At the critical margin, the current doctrinal structure offers no assurance that document production cases will be properly decided. This does not mean that courts currently reach incorrect results in the majority of cases; indeed, the results in most cases are consistent with the modern view that the fifth amendment provides only limited protection for documents. Nonetheless, in close cases courts have not only denied claims that are valid but also honored the privilege when accurate application of fifth amendment principles would require production.

Much of the current confusion stems from the historical development of the fifth amendment as applied to government demands for production of documents. The field is littered with the vestiges of secondary doctrines once necessary to keep the privilege, then stated far more broadly, within reasonable bounds. Though the United States Supreme Court has since corrected the over-expansive view of the fifth amendment that served as the principal justification for their existence, these doctrines have retained vitality. This article proposes to eliminate these legal anachronisms from fifth amendment jurisprudence. Their elimination should both simplify fifth amendment analysis and facilitate more accurate results by permitting courts to direct attention to the critical issues that are relevant to modern fifth amendment doctrine.²

² The proposed analysis would have the additional effect of expanding the privilege in relatively minor ways. Nevertheless, the government should still be able to obtain most documents with minimal cost.

In *Fisher v. United States*,³ the Court formulated a new mode of analysis for documentary subpoenas. Under that analysis, the validity of a subpoena no longer turned on the contents of the documents demanded, but rather on the testimonial and incriminating nature of the act of producing them. The *Fisher* decision represented a major watershed, signaling a fundamental departure from earlier fifth amendment doctrines. Yet it left unanswered several critical questions—the degree to which the act of production must be testimonial and incriminating to invoke fifth amendment protection, the meaning of the “foregone conclusion” concept, and the application and effect of use immunity. Although the Supreme Court reconsidered these principles in *United States v. Doe*,⁴ their full meaning remains unclear, and the Court has offered little guidance on how to apply the testimonial and incriminating inquiries to the act of production. Subsequent lower court decisions have provided some refinements of these ideas, but they have often substituted conclusory labels for considered analysis.

This article attempts to clarify and simplify the law of documentary subpoenas by carefully explicating the critical issues that determine when a subpoena compels testimonial self-incrimination that violates the fifth amendment. Treating documentary subpoenas as part of the familiar fabric of fifth amendment law, rather than as an exception to it, will continue to demand distinctions not easily made. But the result should resemble less a nineteenth-century search for highly technical characterizations of fact situations than a straightforward application of familiar, if sometimes difficult, basic fifth amendment principles.⁵

³ 425 U.S. 391 (1976).

⁴ 465 U.S. 605 (1984).

⁵ The approach suggested in this article—treating documentary subpoenas in a manner more consistent with other aspects of fifth amendment law—is the antithesis of the sort of approach recently proposed by Professor Heidt. See Heidt, *The Fifth Amendment Privilege and Documents—Cutting Fisher’s Tangled Line*, 49 Mo. L. Rev. 439 (1984). He would create a separate and substantially more onerous testimonial standard for documentary subpoenas under the fifth amendment. Implicit admissions resulting from the act of production, he argues, should be regarded as “insufficiently testimonial to trigger the protection of the privilege,” except “in the rare and easily identifiable case where the language of the subpoena discloses on its face that [it] . . . will necessarily establish the elements of a crime.” *Id.* at 484; see also Alito, *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 77-81 (1986) (arguing that subpoenas for documents should not be protected under the fifth amendment but should be regulated only by legislation). By con-

In Part I, the article examines the fundamental elements of fifth amendment analysis relevant to documentary subpoenas. Part II considers the artificial entity exception, a significant legal artifact that has rendered the privilege against self-incrimination inapplicable to document production by representatives of such organizations as corporations, partnerships, and labor unions. In Part III, the article examines several more specific doctrines that have no proper role in modern fifth amendment analysis.

I. THE CORE OF THE ACT-OF-PRODUCTION DOCTRINE: APPLICATION OF THE BASIC CONCEPTS

In *Fisher v. United States*,⁶ the Supreme Court created a new system for evaluating documentary subpoenas under the fifth amendment. In each of two companion cases, the IRS served on the attorneys of taxpayers summonses demanding documents that had been prepared by the taxpayers' accountants. The Court ruled that as a general matter the contents of such documents, which had been created without any government compulsion, are not protected by the fifth amendment.⁷ But the Court noted that the act of producing documents in response to a subpoena "has communicative aspects of its own, wholly aside from the contents of the papers produced."⁸ If that "act of production" would result in compulsory testimonial incrimination, then the witness' claim under the privilege against self-incrimination is valid.⁹

Although its principles were not entirely new, the *Fisher* opinion had an extraordinary impact on the law of documentary subpoenas. As will be discussed in later sections, the Court in *Fisher*

trast, this article will argue that the law needs fewer special categories, standards, and tests for documentary subpoenas, and no more radical reductions of fifth amendment protections without sound justification.

⁶ 425 U.S. 391 (1976).

⁷ Id. at 409-10.

⁸ Id. at 410.

⁹ In *Fisher*, the taxpayers' attorneys possessed the documents. The Court concluded that the fifth amendment was not *directly* applicable, because the compulsion to produce the documents was directed not at the taxpayers but at their attorneys, who had no personal self-incrimination claims. Nevertheless, because the documents had been provided to the attorneys for the purpose of securing legal advice, the Court held that the attorney-client privilege protected the documents if they would have been protected by the fifth amendment while in the taxpayers' possession. Accordingly, the Court had to decide whether the privilege would have applied to production of the documents by the taxpayers. Id. at 403-05.

brushed aside many of the doctrines that had previously dominated fifth amendment analysis. In their place, it created the framework of a new system in which the availability of the privilege turns, apparently exclusively, upon whether the act of production involves testimonial self-incrimination. This article focuses on that new act-of-production doctrine. It accepts as sound *Fisher's* basic premise that the fifth amendment protects documents only when the act of producing them involves testimonial self-incrimination and does not directly protect their contents, even if those contents are personal or private.¹⁰ The point of this article is

¹⁰ Although the correctness of the *Fisher* analysis is not beyond question, this article does not examine that issue. While *Fisher* broke substantial new ground, it represents the culmination of other doctrinal developments, and its basic outline appears to be firmly established in Supreme Court jurisprudence. Moreover, the author finds its basic premise to be sound.

As the text of the fifth amendment itself suggests, the requirement that incriminating testimonial conduct result from governmental compulsion lies at the core of the privilege. See, e.g., *United States v. Doe*, 465 U.S. 605 (1984); *Fisher*, 425 U.S. at 391; *United States v. Nobles*, 422 U.S. 225 (1975); *McGautha v. California*, 402 U.S. 183 (1971), vacated sub nom. *Crampton v. Ohio*, 408 U.S. 941 (1972); *Williams v. Florida*, 399 U.S. 78 (1970).

The principal function of this requirement is appropriately the maintenance of the adversarial system. See, e.g., O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*, 54 *Notre Dame Law. Rev.* 26, 71-72 (1978) (Burger Court has adopted narrow construction of the fifth amendment that rigidly requires testimonial compulsion, ignores protection of privacy, and focuses on "its role in the 'preservation of an adversary system of criminal justice'" (quoting *Garner v. United States*, 424 U.S. 648, 655 (1976))). Both this core meaning and underlying purpose of the privilege are consistent with the limited scope accorded it in *Fisher*.

Efforts to cast the fifth amendment as a means of protecting privacy directly are largely misguided; other provisions of the Constitution, such as the fourth and first amendments, must carry that burden. Privacy concepts are useful in defining the limits of the privilege *negatively*—it may not be invoked unless the challenged practice threatens the privacy of the witness' mental processes. See *Schmerber v. California*, 384 U.S. 757, 762-65 (1966). But absent "compelled testimonial self-incrimination of some sort," a threat to privacy interests alone will not warrant fifth amendment protection. See *Fisher*, 425 U.S. at 399, 401. As a consequence, while the fifth amendment has a role in protecting critical elements of privacy, "protection of personal privacy is merely a byproduct" of its operation. *Id.* at 416 (Brennan, J., concurring). For these reasons, the view that the fifth amendment protects the contents of private documents, see *Boyd v. United States*, 116 U.S. 616 (1886), has no logical place in the privilege as it has developed in the second half of this century.

In spite of *Fisher's* clear indication that the fifth amendment does not protect the contents of private papers directly, a number of lower courts continue to apply the private papers doctrine originated in *Boyd* alongside the act-of-production doctrine. See, e.g., *United States v. Davis*, 636 F.2d 1028, 1042-43 (5th Cir. Unit A Feb.), cert. denied, 454 U.S. 862 (1981); *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033, 1042-43 (3d Cir. 1980); *ICC v. Gould*, 629 F.2d 847, 859 n.22 (3d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States v. Porter*, 557 F. Supp. 703, 713-15 (N.D. Ill.), rev'd on other grounds, 711

neither to support nor to attack the correctness of the *Fisher* decision, but rather to explicate its fundamental analysis and to demonstrate how, if properly understood and applied, that analysis could greatly simplify the law of subpoenas.

In *Fisher*, the Court set out only the skeletal outlines of this new analysis. Although avoidance of precise definition is perhaps appropriate when departing from past doctrines and moving into an uncharted area, the Court's decision left enormous uncertainty regarding the structure and application of the new doctrine.¹¹ This part explores the application of *Fisher*'s basic principles to documentary subpoenas.

A. The Basic Framework

It is firmly established that the fifth amendment is violated only if the defendant's conduct is compelled, testimonial, and incriminating.¹² Although the question of compulsion is of central concern

F.2d 1397 (7th Cir. 1983); *United States v. Beckman*, 545 F. Supp. 1284, 1286-87 (M.D. Fla. 1982); *United States v. Blackburn*, 538 F. Supp. 1376, 1380-81 (M.D. Fla. 1982); see also *United States v. Schlansky*, 709 F.2d 1079, 1083 (6th Cir. 1983) (*Boyd* may still protect private diary), cert. denied, 465 U.S. 1099 (1984); *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1054 n.2 (1st Cir. 1980) (whether *Boyd* still protects "non-business, intimate personal papers such as private diaries or drafts of letters or essays is an open question"); *United States v. Helina*, 549 F.2d 713, 716-17 (9th Cir. 1977) (*Boyd* may protect private tax records).

In some of these cases, courts have even ruled that *Boyd* continues to protect personal business records, in addition to documents of a more intimate nature. See *Davis*, 636 F.2d at 1042-43; see also *Johanson*, 632 F.2d at 1042-43 (personal business diary); *Porter*, 557 F. Supp. at 713-15 (personal appointment book). In *Doe*, however, the Court held that *Boyd* did not protect the contents of a sole proprietor's business records from subpoena. *Doe*, 465 U.S. at 610-12. After *Doe*, the scope of potential protection apparently has been narrowed to cover only the contents of personally prepared, non-business, intimate private documents. See *In re Grand Jury Subpoenas Served Feb. 27, 1984*, 599 F. Supp. 1006, 1011 (E.D. Wash. 1984). But see *United States v. (Under Seal)*, 745 F.2d 834, 840 n.12 (4th Cir. 1984) (papers, including financial and commercial records, held in individual, as opposed to representative, capacity protected), cert. granted sub nom. *United States v. Doe*, 469 U.S. 1188, vacated as moot, 471 U.S. 1001 (1985).

¹¹ See Heidt, *supra* note 5, at 443 n.14, 480 n.170 ("*Fisher* has produced utter confusion in the lower courts"); Comment, *United States v. Doe* and its Progeny: A Reevaluation of the Fifth Amendment's Application to Custodians of Corporate Records, 40 Miami L. Rev. 793, 803 & n.69 (1986) ("Because the Court announced a new analytical framework without providing much guidance, lower courts had difficulty applying the new 'act of production' doctrine to different factual settings." (footnotes omitted)).

¹² See, e.g., McCormick on Evidence §§ 123-25 (E. Cleary 3d ed. 1984).

in other contexts,¹³ the issue poses no great difficulties with regard to subpoenas for documents; the requirement that the witness produce documents demanded by subpoena or face the threat of the direct, external sanction of contempt for his failure to comply clearly constitutes compulsion within the meaning of the Constitution.¹⁴ The critical issues are rather whether compliance with the subpoena entails communicative or testimonial conduct and whether that conduct is incriminating.¹⁵

The Court in *Fisher* identified three potentially “communicative aspects” of the act of producing documents in compliance with a subpoena: it may (1) authenticate the document; (2) establish the witness’ possession or control of it; or (3) reveal its existence.¹⁶ The Court observed generally that the questions whether these implied admissions are sufficiently testimonial and incriminating to trigger the fifth amendment “perhaps do not lend themselves to categorical answers” but “instead depend on the facts and circumstances of particular cases or classes thereof.”¹⁷ On the facts before it, however, the Court concluded that compliance with the particular sub-

¹³ See *Williams v. Florida*, 399 U.S. 78 (1970) (defendant’s response to notice-of-alibi rule not compelled under fifth amendment); see also Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Calif. L. Rev. (forthcoming Oct. 1986) (examining compulsion issue in context of discovery against the criminal defendant).

¹⁴ *Fisher*, 425 U.S. at 409.

¹⁵ *Id.* at 409-10.

The item demanded need not be testimonial in nature, although some cases have erroneously imposed this requirement. See, e.g., *United States v. Palmer*, 536 F.2d 1278, 1281 (9th Cir. 1976) (because physical items subpoenaed from defendant were themselves “neither ‘testimonial nor communicative’ in nature,” fifth amendment was not violated); *In re Crabtree*, 39 Bankr. 726, 731 (Bankr. E.D. Tenn. 1984) (“the turnover of property of the estate, exclusive of recorded information, does not involve testimony”); *In re Vanderbilt (Rosner-Hickey)*, 57 N.Y.2d 66, 79, 439 N.E.2d 378, 385, 453 N.Y.S.2d 662, 670 (1982) (“the evidence itself must be testimonial and the act of production also must include some testimonial quality”).

Indeed, with respect to this doctrine, whether the item demanded is a written document or real evidence is entirely irrelevant. See *Fisher*, 425 U.S. at 410 n.11 (“In the case of a documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel or document not authored by the producer is demanded.”); *In re Grand Jury Empanelled Feb. 14, 1978 (Markowitz)*, 603 F.2d 469, 476 n.9 (3d Cir. 1979); *United States v. Beattie*, 522 F.2d 267, 270 n.6 (2d Cir. 1975), vacated, 425 U.S. 967, cert. denied, 425 U.S. 970, modified, 541 F.2d 329 (2d Cir. 1976). The relevant question is whether the act of producing the item is itself testimonial.

¹⁶ *Fisher*, 425 U.S. at 410.

¹⁷ *Id.*

poena did not involve testimonial incrimination.¹⁸

Although it did not squarely decide the issue, the *Fisher* Court suggested that, on the facts presented, any admissions of possession or existence implicit in production were not sufficiently testimonial to warrant protection under the fifth amendment. It noted that the government was not relying "on the 'truthtelling' of the taxpayer" to prove either fact; that each was a "foregone conclusion" and the witness' concession "add[ed] little or nothing to the sum total of the Government's information"; and that neither was seriously at issue in the case.¹⁹ The Court made no reference to the testimonial nature of the implied admission of authenticity, apparently conceding that it was appropriately characterized as testimonial.

With the lone observation that "surely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer," the Court held that the admissions of existence and possession inherent in production did not satisfy the incrimination requirement.²⁰ As to the admission of authenticity, the Court concluded that because the "taxpayer did not prepare the papers and could not vouch for their accuracy," they "would not be admissible in evidence against [him] without authenticating testimony."²¹ Accordingly, any implicit authentication resulting from production of the papers "would not appear to represent a substantial threat of self-incrimination."²²

The Court's treatment of the testimonial and incrimination issues provided few concrete answers and raised a substantial number of new issues. First, the opinion seemed to establish a new and

¹⁸ Id. at 410-11.

¹⁹ Id. at 411-12. In suggesting that possession and existence were not in issue, the Court analogized compelled production of the accountants' documents to compelling a witness to provide handwriting exemplars or compelling the representatives of certain types of organizations, known as "collective entities," to produce organizational records. The Court reasoned that, as in those situations, the minimal nature of the communication and the lack of dispute about the issues affected by production meant that production of the accountants' papers was not "sufficiently testimonial for purposes of the privilege." Id.

²⁰ Id. at 412.

²¹ Id. at 413.

²² Id. In supporting its conclusion, the Court compared the situation in *Fisher* to the rule that a custodian of a collective entity must produce its records even though "producing them would itself be sufficient authentication to permit their introduction against him." Id. at 413 & n.14; see *infra* note 252.

higher standard for both the testimonial and the incrimination requirements.²³ Second, it introduced the foregone conclusion concept without explaining either its origins or the scope of its operation.²⁴ Third, its evidentiary analysis and accompanying hypothetical applications were confused and misleading.²⁵

Returning to documentary subpoena issues eight years later in *United States v. Doe*,²⁶ the Court again failed to clarify the application of the testimonial and incrimination concepts to the act of production. The courts below had ruled that the defendant's fifth amendment rights had been violated because "the act of producing the documents would involve testimonial self-incrimination."²⁷ The Supreme Court affirmed. The Court's opinion, however, established little more than the principle that the *contents* of a sole pro-

²³ Some courts and commentators have read *Fisher* to establish a different and higher standard for the testimonial and incriminating requirements. See *United States v. Schlansky*, 709 F.2d 1079, 1084 (6th Cir. 1983) (testimonial communication requires that "the very act of production supplies a necessary link in the evidentiary chain"), cert. denied, 465 U.S. 1099 (1984); *infra* note 57 and accompanying text. Indeed, a plurality of the Court had attempted to create a higher standard on both issues in *California v. Byers*, 402 U.S. 424 (1971); cf. *Williams v. Florida*, 399 U.S. 78, 86 n.17 (1970) (suggesting testimonial requirement could not be met when applied to proposed trial conduct).

But no higher standard was, in fact, created in *Fisher*, and none would logically flow from the principles the Court set out there. First, with regard to the testimonial standard, the Court's treatment of later cases does not support the existence of a higher standard. See *United States v. Doe*, 465 U.S. 605 (1984); cf. *South Dakota v. Neville*, 459 U.S. 553, 560-62 (1983) (Court declined to treat refusal to take blood test to determine alcohol content as non-testimonial); *Estelle v. Smith*, 451 U.S. 454, 463-65 (1981) (Court declined to treat defendant's responses in psychiatric interview as non-testimonial). Second, with regard to incrimination, the Court clearly did not intend to state a higher standard for the implied admission of authenticity. See *infra* note 50. On the possession issue, a more demanding showing of incrimination—but not a higher standard—is indeed analytically sound, and *Fisher* may properly be understood to announce that position. See *infra* notes 57 & 81 and accompanying text.

²⁴ *Fisher*, 425 U.S. at 411; see *infra* notes 93-97 and accompanying text.

²⁵ The Court suggested that the defendant could not authenticate the documents because he "could not vouch for their accuracy," *Fisher*, 425 U.S. at 413, but accuracy and authenticity are entirely different concepts. The Court also stated that the taxpayer would be incompetent to authenticate the items. This is incorrect as a matter of the law of evidence. See *infra* notes 48-49 and accompanying text.

The Court's suggestion that the testimonial aspect of providing a handwriting exemplar is similar to establishing possession or existence through the act of production, see *Fisher*, 425 U.S. at 411, appears misguided. The testimonial communication involved in providing handwriting is indeed minimal when compared with the often clearly testimonial nature of admitting the possession and existence of documents.

²⁶ 465 U.S. 605 (1984).

²⁷ *Id.* at 613.

prietor's business documents are not protected by the fifth amendment.²⁸ The Court did not purport to analyze whether production was testimonial or incriminating, and whether it would have agreed on independent examination with the result reached by the courts below on these issues is uncertain. Approaching their rulings as factual determinations, the Court relied on its reluctance "to disturb findings of fact in which two courts below have concurred."²⁹

²⁸ *Id.* at 610-12. The Court's treatment of the foregone conclusion concept promised to confuse what little *Fisher* had revealed of it. The Court's discussion might be read to transform the doctrine from one applicable to the testimonial issue, see *Fisher*, 425 U.S. at 411-12, to one bearing on incrimination, see *Doe*, 465 U.S. at 614 n.13. In *Doe*, the Court combined in the same discussion the government's argument that any incrimination would be so trivial that the fifth amendment is not implicated and its own suggestion that the government could rebut respondent's self-incrimination claim by producing evidence that possession, existence, and authentication were a foregone conclusion. *Id.* This treatment suggests that a foregone conclusion and a de minimis level of incrimination may be equivalent.

The appropriate reading of these statements, however, leaves the foregone conclusion issue applicable only to the question of whether conduct is testimonial. See *infra* note 101 and accompanying text. *Doe*'s only real addition to the foregone conclusion concept was to make clear that it can apply not only to the communicative aspects of possession and existence, as discussed in *Fisher*, but also to authentication, which was not treated under that doctrine in *Fisher*. See *Doe*, 465 U.S. at 614 n.13.

²⁹ *Doe*, 465 U.S. at 614. The Court's failure to provide its own evaluation of these facts is especially unfortunate given the great gulf between the position taken by the lower courts and that argued by the government. The government appears to have made no particularized attempt to demonstrate that the existence of documents covered by the subpoenas was a foregone conclusion. Rather, it assumed a very aggressive position on these issues, arguing that the entire category of "standard business records" should be excluded from fifth amendment protection because admitting their existence "rarely could amount to testimonial self-incrimination." Brief for the United States at 31, *Doe* (No. 82-786); see also *id.* at 33-38 (making similar argument concerning authentication).

The district court rejected the government's position, apparently because it refused to accept the validity of the foregone conclusion concept, stating flatly that the strength of the prosecution's independent proof was irrelevant to the testimonial issue. See *In re Grand Jury Empanelled Mar. 19, 1980*, 541 F. Supp. 1, 3 (D.N.J. 1981), *aff'd*, 680 F.2d 327 (3d Cir. 1982), *aff'd in part and rev'd in part sub nom. United States v. Doe*, 465 U.S. 605 (1984). The United States Court of Appeals for the Third Circuit, though it apparently accepted the foregone conclusion concept in principle, adopted an almost impossibly high standard for its proof and rejected the government's position because the record did not show that the government "knows, as a certainty, that each of the myriad documents . . . in fact is in [Doe's] possession or subject to his control." *In re Grand Jury Empanelled Mar. 19, 1980*, 680 F.2d 327, 335 (3d Cir. 1982), *aff'd in part and rev'd in part sub nom. United States v. Doe*, 465 U.S. 605 (1984).

At most, the Supreme Court simply rejected the government's general position, noting that although the government might have proved that authentication, possession, and existence were foregone conclusions, it had "failed to make such a showing." *Doe*, 465 U.S. at 614 n.13. The Court failed to make clear just what such a showing would entail. If it were clear that the Court meant to adopt the strict position of the Third Circuit, *Doe* would be a

The *Doe* decision left largely unanswered the questions of when the act of production is sufficiently testimonial and to what extent it must incriminate to warrant protection under the fifth amendment. The Court has, in effect, abdicated that task to the lower federal and state courts.

B. Testimonial and Incriminating Aspects of Production

As noted above, compliance with a subpoena for documents may communicate authenticity, possession or control, or existence. Because the three types of implied communication present largely separate fifth amendment issues, this part will consider each in turn.

1. Authentication

The first step in determining whether production of documents generates a testimonial communication as to authenticity is to examine the nature of the subpoena's demand, concentrating particularly on the implicit—and sometimes explicit—question it asks about the documents sought. The fundamental distinction between items obtained through subpoena and those obtained under a search warrant illustrates how a subpoena may require a testimonial response that is helpful in authenticating the item produced. A search warrant identifies and describes the documents or objects to be seized, and the officer executing the warrant matches what he finds to its specifications. By contrast, a “subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena.”³⁰

Another way to conceptualize the point is to view the subpoena

very important decision on the interpretation of these practical issues, which lie at the heart of fifth amendment analysis. But see W. LaFare & J. Israel, *Criminal Procedure* § 8.12, at 56-59 (West Supp. 1986) (suggesting that the Supreme Court decision in *Doe* should be read as itself expressing at least a limited independent judgment on these issues).

³⁰ *United States v. Blank*, 459 F.2d 383, 385 (6th Cir.), cert. denied, 409 U.S. 887 (1972); see also *Fisher*, 425 U.S. at 410 (“act of producing evidence in response to a subpoena . . . would indicate the [witness’] belief that the papers are those described in the subpoena”); *Curcio v. United States*, 354 U.S. 118, 125 (1957) (“The custodian’s act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena.”). Wigmore described the subpoena as requiring testimony under the fifth amendment because the assurance of compliance implicit in production depends on the witness’ “moral responsibility for truth-telling.” 8 J. Wigmore, *Evidence* § 2264, at 379 (McNaughton rev. 1961) (emphasis omitted).

as asking, "Do you have a document of 'X' description?," a question that the witness answers affirmatively by producing it. As will be developed below, a critical factor in determining whether the fifth amendment is violated with regard to authentication is the tenor of this question: is it objectively precise, or does it require a discrimination by the witness that is relevant to an issue in the case?

Some demands for production require very communicative responses. The facts of *Davis v. Israel*,³¹ where the defendant was asked to produce non-communicative physical objects, provide an especially helpful example. The police ordered Davis, who was wearing only underwear when arrested on murder charges, to put on the clothes he had been wearing the previous evening when the murder had occurred. An order to put on clothing is generally not meaningfully testimonial.³² This order to put on clothing worn at a particular time, however, required Davis to recall what he was wearing, to determine whether he would respond truthfully or untruthfully, and to communicate information about historical fact.³³

In general, a subpoena compels testimonial conduct under the fifth amendment whenever it requires the witness to make a discrimination between documents and thereby to provide identifying information that is relevant to authenticity.³⁴ In *United States v. Beattie*,³⁵ for example, a subpoena called for accountant

³¹ 453 F. Supp. 1316, 1323-26 (E.D. Wis. 1978), *aff'd mem.*, 601 F.2d 594 (7th Cir. 1979).

³² Some non-verbal conduct may, of course, merit constitutional protection. See *Schmerber v. California*, 384 U.S. 757, 761 n.5, 764 (1966) (Constitution protects communicative nod or shake of head as well as involuntary physiological responses to lie detector test, because compulsion of such responses "evoke[s] the spirit and history of the Fifth Amendment"); see also Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 Am. Crim. L. Rev. 31, 42-44 (1982) (fifth amendment should protect conduct when individual subjectively intends to communicate thoughts or when state forces him to disclose involuntarily his private thoughts about criminal conduct).

³³ In *State ex rel. Hyder v. Superior Court*, 128 Ariz. 253, 625 P.2d 316 (1981), a subpoena required communicative conduct similar to that ordered by the officer in *Davis*. It commanded the defendant, Ronald Wayman, to produce "all personal letters written to SANDRA MARIE WAYMAN by RONALD A. WAYMAN." *Id.* at 254, 625 P.2d at 317. The court held that "compliance with this subpoena would authenticate these letters since in producing them Wayman admits, by the wording of the subpoena, that he is their author." *Id.* at 256, 625 P.2d at 319.

³⁴ The degree to which a particular subpoena compels an explicitly testimonial response depends, of course, upon the exact phrasing of its demand.

³⁵ 522 F.2d 267 (2d Cir. 1975), vacated, 425 U.S. 967, cert. denied, 425 U.S. 970, modified, 541 F.2d 329 (1976).

workpapers and various other documents including “any correspondence” that was “used in the preparation” of the witness’ tax return.³⁶ Because compliance with the subpoena required the witness to select documents used for a certain purpose, it entailed testimonial conduct.

By contrast, when the subpoena describes the item to be produced so particularly and objectively that an uninformed third party could respond to its demand, the communication of authenticity in production is non-testimonial, because it requires no selection or discrimination by the witness. Take the example of a personal diary of the witness that the subpoena describes by color, size, and inscription.³⁷ A subpoena commanding production of that

³⁶ Id. at 268 (emphasis added). Similarly, in *United States v. Fox*, 721 F.2d 32 (2d Cir. 1983), a subpoena required production of “[a]ll books and records, invoices, statement[s] and other documents *pertaining to the operation of*” the witness’ sole proprietorship and “[a]ll savings account passbooks, brokerage account statements, 1099s, . . . [etc.] *for the taxpayer[s] Martin and Tamar Fox.*” Id. at 34 (emphasis added). The court refused to enforce this “broad-sweeping” subpoena. Id. at 38. In *United States v. Porter*, 711 F.2d 1397 (7th Cir. 1983), a taxpayer’s attorney received an IRS summons demanding that she produce records “relating to” the taxpayer’s checking and savings accounts, including cancelled checks, deposit slips, and so forth. Id. at 1398. The court held that the implicit authentication resulting from production was “undeniable.” Id. at 1401-02.

In each of these cases, the wording of the subpoena required the witness to produce documents and also to provide, implicitly, information about historical fact concerning those documents that was relevant to proof of criminal activity. The documents were generically defined by broad categories and were further designated by a characteristic that would be explicitly relevant to proof of facts in the case—use, preparation, and ownership by the defendant.

It should make no difference whether the subpoena requires the witness to admit all elements of authenticity or merely to vouch for some relevant designation of the documents that, when combined with facts outside the subpoena’s literal demand, will authenticate the items. For instance, *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051 (1st Cir. 1980), shows that a response is testimonial even when authentication would require proof beyond the information provided implicitly by responding to the subpoena. In *Martinez*, the grand jury was investigating illegal payments made by a hospital corporation to officials of a labor union. It subpoenaed the chairman of the hospital’s board of directors and commanded that he bring “all appointment books for the years 1975 thru [sic] 1978,” which the government anticipated would disclose meetings with union officials. Id. at 1052-53. The doctor introduced evidence that these logs were prepared by his secretary, under “the sole direction of the doctor.” Id. at 1053. Based on this proof concerning the manner of preparation of the books, the court held that providing the records “would constitute sufficient authentication to allow introduction of the records’ content against him.” Id. at 1055-56.

³⁷ Such information might be obtained by the prosecution from a spouse, friend, or employee of the witness. See, e.g., *United States v. Schlansky*, 709 F.2d 1079 (6th Cir. 1983), cert. denied, 465 U.S. 1099 (1984). There, the government provided a very detailed description of the documents demanded, which it had apparently obtained from persons who had

diary would compel no testimonial information identifying and thereby authenticating the diary;³⁸ it would require only that the defendant surrender what the prosecution had already identified.³⁹

Even here, production requires testimony as to authenticity in the sense that it communicates the witness' belief that the item produced is that described in the subpoena. That communication, however, conveys nothing more than that the witness can read the subpoena and follow its commands.⁴⁰ If the item is so specifically identified as to leave no room for discretionary judgments entailing truth-telling by the witness, compliance with the subpoena is not testimonial.⁴¹

Accordingly, with respect to the issue of authentication, whether a subpoena requires testimonial communication turns on the nature of the wording of the demand: does it ask if the item bears a relevant relationship to the issues of the case,⁴² or does it simply

used them to prepare the defendant's tax returns. The subpoena directed the witness to produce "[a] ring binder containing 8" x 12" sheets (approximate), 3 inches deep, containing canceled checks, bank statements, invoices, receipts glued to the accounts worksheets for the years 1976 and 1977." *Id.* at 1081.

³⁸ This statement is accurate as to direct authentication by responding to the subpoena. As discussed below, however, the fact of possession in some instances would help to prove authenticity circumstantially. See *infra* note 80.

³⁹ "The question is not of testimony but of surrender." *In re Harris*, 221 U.S. 274, 279 (1911). *United States v. Stoecker*, 17 M.J. 158 (C.M.A.), mandate issued, 17 M.J. 341 (C.M.A. 1984), is also instructive. While the defendant was assisting in a search of his room, Schopper, the investigating officer, observed him surreptitiously place a small item in his pocket. Schopper told the defendant to "give me the box." *Id.* at 160. As the court noted, "when Sergeant Schopper asked appellant to hand over the box, he was not requesting that Stoecker identify the box in any way or verify its ownership. Moreover, appellant's action in handing over the box to Schopper did not constitute any implied representation as to its character or contents." *Id.* at 162.

⁴⁰ Similarly insignificant communications have been found to be outside the protection of the fifth amendment. See *Fisher*, 425 U.S. at 411 (admissions inherent in mere submission of handwriting exemplar not sufficiently testimonial to merit fifth amendment protection); *Gilbert v. California*, 388 U.S. 263, 265-67 (1967) (handwriting exemplar not violative of fifth amendment where its content was neither testimonial nor communicative); *United States v. Wade*, 388 U.S. 218, 222-23 (1967) (voice exemplars, though requiring the defendant's speech, outside fifth amendment because used as a physical characteristic and not for their communicative content).

⁴¹ To avoid triggering a witness' fifth amendment privilege, the subpoena must not require more explicit authentication by ordering, for example, production of "your diary."

⁴² As developed above, see *supra* note 36, whether the subpoena requires a testimonial discrimination in the selection of materials relevant to authenticity depends both on the wording of the subpoena and on the facts extraneous to its demand that concern the making and maintenance of the item.

command the witness to deliver items of a specified description to the prosecution? A specific, objectively defined demand will operate much like a search warrant; like a warrant, it is not testimonial because the witness is asked to perform the same kind of operation that an officer conducting a search would perform—turn over to the authorities the items specifically described, without providing further testimony concerning their authenticity.⁴³

Besides satisfying the testimonial requirement, any communication of authenticity inherent in production must threaten to incriminate the witness to a degree sufficient to invoke the protections of the fifth amendment.⁴⁴ Resolving this issue entails two separate inquiries. First, the content or character of the document itself must threaten to link the witness to a particular crime—that is, it must contain some incriminating fact. This is not a *sufficient* quality of the document; the fact that the document is highly incriminating by itself does not invoke the protections of the fifth amendment. It is, however, a *necessary* characteristic. Unless the content or character of the document threatens incrimination, its authentication is irrelevant to the prosecution's case and thus to the fifth amendment.⁴⁵ Second, the act of producing the incriminating document must assist in linking it to the witness. But what is sufficient to do so—the standard of incrimination as to authentication—was left in a state of some confusion by the Court's treatment of the issue in *Fisher*.

⁴³ In *United States v. Schlansky*, 709 F.2d 1079 (6th Cir. 1983), cert. denied, 465 U.S. 1099 (1984), the witness was served with a very detailed IRS summons. The court held that there was no "testimonial ingredient" in production. *Id.* at 1083. Production of even the portions of the materials prepared by the witness would entail no authentication or truth-telling but convey only the witness' belief that the "papers are those described in the [summons]." *Id.* (quoting *Fisher*, 425 U.S. at 413).

⁴⁴ The Supreme Court's formulation of the standard by which the threat of incrimination is to be measured has varied somewhat. In *Hoffman v. United States*, 341 U.S. 479 (1951), the Court expressed the standard liberally: "The privilege . . . not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . ." *Id.* at 486. In *Marchetti v. United States*, 390 U.S. 39 (1968), however, the Court articulated what seems to be a narrower or more conservative construction: "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Id.* at 53.

⁴⁵ See, e.g., *Butcher v. Bailey*, 753 F.2d 465, 470 (6th Cir.) ("There can be nothing incriminating about authenticating an innocuous document. Authentication cannot be incriminating unless the contents of the document tend to incriminate."), cert. dismissed, 106 S. Ct. 17 (1985).

The subpoena in *Fisher* called for the production of documents created by the taxpayers' accountants. The Court held that the act of production did not "represent a substantial threat of self-incrimination" because the taxpayers themselves would not be competent to authenticate the accountants' workpapers and reports, as they had not prepared them and could not vouch for their "accuracy."⁴⁶ Had it been a correct statement of the law on authentication, this analysis would have made perfect sense—the statement implicit in producing the documents could not have incriminated, because it would have been irrelevant to proof of authenticity and thus inadmissible. The Court erred, however, by using the term "accuracy" as if it were interchangeable with "authenticity."⁴⁷

To be admissible to authenticate a document, a witness' testimony need not prove the accuracy or the truth of the document's contents, but merely help to establish that the document is what it purports to be, or more broadly, that it has a relevant connection to the issues in the case.⁴⁸ As a matter of the law of evidence, then, a party opponent's implicit admission—through the act of produc-

⁴⁶ *Fisher*, 425 U.S. at 413.

⁴⁷ Some lower courts have misconstrued the treatment of the authentication issue in *Fisher* and converted it into a universal bright line—only documents created by the defendant or under his control threaten incrimination by virtue of implicit authentication. For instance, in *In re Grand Jury Proceedings* (Martinez), 626 F.2d 1051, 1054 (1st Cir. 1980), the United States Court of Appeals for the First Circuit ruled that a party could not invoke the fifth amendment privilege to avoid producing documents prepared by third parties. In *In re Kave*, 760 F.2d 343 (1st Cir. 1985), the First Circuit modified this stance somewhat, recognizing correctly that producing "non-self-created documents" may incriminate through proof of possession or existence. *Id.* at 356-57 & n.27. The First Circuit erroneously adhered, however, to its position that authentication was only a threat if the documents were created by the witness herself. See *id.* at 356 n.27.

As the facts of *United States v. Fox*, 721 F.2d 32 (2d Cir. 1983), demonstrate, that position is erroneous. The subpoena to Mr. Fox called for the production, *inter alia*, of all "invoices, statement[s] and other documents pertaining to the operation" of the defendant's sole proprietorship. *Id.* at 34. Responding to the subpoena's command would authenticate records prepared by third parties as items upon which the defendant had relied in determining his taxes. These records would then be admissible to prove his alleged income tax evasion. Thus, resolution of the incrimination issue does not permit a categorical answer based simply upon who created the document.

⁴⁸ See Fed. R. Evid. 401, 901; see also 1 S. Beale & W. Bryson, *Grand Jury Law and Practice* § 6:33, at 215 n.3 (1986) (proof of authenticity requires only a showing that the document "is what the proponent claims it is," not that it is accurate or truthful; a document can be genuine without being accurate); 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 901(a)[02], at 20-21 (1983) ("Authentication and identification of evidence are merely aspects of relevancy which are a necessary condition precedent to admissibility.").

tion—that certain documents are his accountant's workpapers should be admissible and helpful to establish the authenticity of the documents.⁴⁹

Despite the error concerning the law of evidence, the Court properly concluded in *Fisher* that compelling production of the accountants' papers did not violate the fifth amendment by compelling incriminating testimony as to authenticity. The Court's conclusion can be justified on two grounds. First, the implied admission of authenticity was not sufficiently incriminating to implicate the fifth amendment. Because authentication of the papers would have had only minimal value in establishing their admissibility, any "incrimination would be so trivial that the Fifth Amendment is not implicated."⁵⁰ Indeed, the probative value of the documents in *Fisher* appears to have depended entirely on their accuracy—the truth of the matter asserted, in the terminology of hearsay rules—rather than on the fact that they had been received by the defendants. As a result, additional testimony from the accountants or other sources would have been required to establish their admissibility under the hearsay rules,⁵¹ and the assistance provided by the taxpayers' admissions would have been modest at best.⁵² Holding that such an insubstantial contribution

⁴⁹ See Fed. R. Evid. 801(d)(2)(A)-(B). Although some controversy exists as to admissions by agents of a party, there is agreement that an admission of the party opponent himself operates as an exception to the general requirement that the witness possess firsthand knowledge. See McCormick on Evidence § 263, at 778 (E. Cleary 3d ed. 1984) (traditional view and the greater number of decisions hold that first-hand knowledge is not required for admissions); 4 J. Weinstein & M. Berger, *supra* note 48, ¶¶ 801(d)(2)(A)[01], at 190, 801(d)(2)(C)[01], at 216-17 (federal rules follow traditional rule that admissions by party need not be based on personal knowledge, but principle should not be applied to admissions by agents).

⁵⁰ *Doe*, 465 U.S. at 614 n.13. The Court's treatment of the incrimination issue in *Fisher* could be read as establishing a high standard for incrimination—essentially that the implicit admission of authentication alone must incriminate. See *Fisher*, 425 U.S. at 412-13. It is absolutely clear, however, that the Court had no such intent, because under its evidentiary analysis the act of producing the documents was irrelevant to proof of authenticity. See *id.* Because it thought the evidence was inadmissible on this ground, the Court had no occasion to consider whether the evidence had a sufficient tendency to incriminate.

⁵¹ See 5 J. Weinstein & M. Berger, *supra* note 48, ¶ 901(a)[02], at 23 ("Merely because a document has been authenticated does not mean that it is admissible. If offered to prove the truth of the assertions made in it, the document will need to meet hearsay requirements.") (footnote omitted); see also *United States v. One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040, 1042 (5th Cir. 1979) (government's stipulation to authenticity of out-of-court statement did not satisfy hearsay requirement for admissibility).

⁵² Although possible uses of the evidence were not explicitly limited, the record gave no

to admissibility does not incriminate the taxpayers would do little violence to the already malleable concept of incrimination.⁵³

Second, the communication of authenticity in *Fisher* may not have been sufficiently testimonial to implicate the fifth amendment. As indicated by the discussion below, the authenticity of the documents in *Fisher* could have been considered a foregone conclusion. So analyzed, the authenticating effect of producing the accountants' papers clearly would not violate the fifth amendment.⁵⁴

2. Possession or Control

Producing a document in response to a subpoena demonstrates that the defendant possessed that document, or at least had sufficient control over it that he could provide it upon demand. The act of production communicates this implicit information in every case; unlike the admission as to authenticity, this testimonial communication cannot be eliminated by alteration of the wording of the subpoena.⁵⁵ Thus, the primary issue is whether this admission of possession is incriminating.

indication that the government wanted the accountants' documents for any purpose that would not depend on their substantive accuracy. See *United States v. Fisher*, 500 F.2d 683, 685 (3d Cir. 1974) (papers contained accountant's analysis of taxpayer's income and expenses), *aff'd*, 425 U.S. 391 (1971); see also *United States v. Kasmir*, 499 F.2d 444, 446-47 (5th Cir. 1974) (similar records), *rev'd*, 425 U.S. 391 (1976). In some circumstances, such as when the defendant's mere possession or use of a document is relevant to an issue like knowledge, the documents need not be accurate to be admissible, and the taxpayer's admission through the act of production would be very significant. In others, when third-party documents are relevant only if substantially admissible under a hearsay rule, a response to the subpoena's demand, though perhaps admitting authenticity, would not be sufficient to establish the foundation necessary for admission as a business record.

⁵³ The witness must be confronted with "substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (quoted in *Doe*, 465 U.S. at 614 n.13, as supporting government's argument that trivial incrimination does not violate the privilege).

⁵⁴ See *infra* note 93. Using the foregone conclusion concept, which relates to the fifth amendment's testimonial element rather than to its incrimination requirement, permits a court to consider the existence of other evidence establishing authenticity and the extent to which authenticity is actually contested in the case. See *infra* notes 100-02 and accompanying text.

⁵⁵ Accordingly, it is irrelevant to the fifth amendment analysis regarding this communicative aspect of production whether the subpoena objectively describes the document or requires the defendant selectively to identify it. The demand for production of a document is always communicative with regard to possession and will satisfy the fifth amendment's testimonial requirement unless it falls within the foregone conclusion concept. See *infra* note 70.

There is one minor exception to the general rule that the nature of the subpoena's de-

In *Fisher*, the Supreme Court assumed that compliance with the subpoena was testimonial because it implicitly acknowledged the witness' possession of the papers. It held, however, that such possession was not incriminating:

[S]urely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer. At this juncture, we are quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer.⁵⁶

Some courts and commentators have read this aspect of the *Fisher* decision to establish a very high standard of incrimination applicable to the act of production generally or to require that possession of the document, standing alone, be itself sufficient to establish guilt.⁵⁷ When possession of the item or document

mand does not affect the testimonial quality of the admission of possession. When possession is used to demonstrate knowledge of the contents of the document, a subpoena that requires delivery of documents described in terms of their contents will require the witness to admit *present* knowledge of the contents. Even here, though, the major issue remains one of incrimination. See *infra* note 61.

Whether possession is incriminating, by contrast, may be affected by the nature of the subpoena's demand. For example, the United States Court of Appeals for the Second Circuit takes the view that a corporate custodian's compliance with a subpoena seeking corporate records communicates only that the corporation possessed or controlled the documents and thus cannot incriminate the custodian personally. See *In re Grand Jury Subpoenas Duces Tecum* Dated June 13, 1983 & June 22, 1983, 722 F.2d 981, 986 (2d Cir. 1983). On this view, directing the subpoena at documents held in a representative capacity may eliminate the incriminating element. See *infra* note 251. But even with regard to documents held in a representative capacity, it is not possible categorically to eliminate the incriminating aspect of possession. For example, if the corporation is a one-man operation or if other facts would show that only the custodian would have had possession of these items within the corporation, then the custodian could be incriminated by producing records held in a representative capacity.

⁵⁶ *Fisher*, 425 U.S. at 412.

⁵⁷ See, e.g., *In re Grand Jury Proceedings (Bardier)*, 486 F. Supp. 1203, 1213 (D. Nev. 1980) (*Fisher* implied that documents must be "inherently self-incriminatory" to merit protection); Heidt, *supra* note 5, at 477 (witness apparently must demonstrate that admissions are "incriminatory on their face"); Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945, 979 & n.213 (1977) (under *Fisher*, implicit admissions of existence and possession satisfy incrimination requirement only if they amount to "confessions of crime").

As will be developed in the text below, construing *Fisher* to require that possession alone be incriminating—though it need not be illegal—seems sound. *Fisher* ought not to be read, however, as establishing such a high standard with respect to the admission of *existence*.

subpoenaed constitutes a criminal act, the fifth amendment's incrimination requirement is undoubtedly satisfied by compelled production.⁵⁸ But while application of the privilege to the communication of possession is indeed narrow, it is not limited to situations where possession itself is a criminal offense.

*State v. Alexander*⁵⁹ provides an excellent example of a situation where possession is itself incriminating, though it is not illegal.⁶⁰ The state filed a criminal complaint for violation of Minneapolis' obscenity ordinance, based on a police officer's viewing of a film at a movie house, against four named individuals who were believed to own and operate the theater. The prosecution then obtained a judicial order requiring the defendants to submit the movie to the court to determine if it was obscene.

The defendants argued that producing the film for the court would be incriminating because it would admit their possession or control of the film; they contended that it would be easier for the state to prove this element of the offense if they produced the film.⁶¹ The court accepted this argument. Although the state

Admitting the existence of a document will be incriminating in and of itself only in the rare situation where the subpoena has demanded documents in terms of their criminal subject matter—records of illegal drug transactions, for instance—as opposed to their more general character—all business ledgers, for example.

Indeed, the Court has apparently recognized the error of its suggestion that existence itself must be incriminating, for in *Doe* it affirmed the determination below that the act of production was testimonially incriminating because it proved the existence of documents. *Doe*, 465 U.S. at 613-14 & n.12. The mere existence of documents in that case could not by itself have been incriminating; only the contents of the documents incriminated.

⁵⁸ See, e.g., *United States v. Campos-Serrano*, 430 F.2d 173 (7th Cir. 1970) (because possession of forged alien registration receipt card is illegal, forced production of it during interrogation violated fifth amendment), cert. denied, 404 U.S. 1023 (1972); *State v. Dennis*, 16 Wash. App. 417, 558 P.2d 297 (1976) (compelled production of cocaine by defendant from location in his apartment during questioning violated fifth amendment).

⁵⁹ 281 N.W.2d 349 (Minn. 1979).

⁶⁰ Possession of an obscene film is not by itself sufficient to establish guilt, because most obscenity statutes require proof that the defendant not only possessed obscene material but also displayed it to others. See, e.g., Minn. Stat. Ann. § 617.241 Subd. 2 (West Supp. 1987) (unlawful to knowingly exhibit obscene motion picture film). By contrast, the mere possession of contraband is criminal, and producing such an item in response to a subpoena incriminates by itself.

⁶¹ *Alexander*, 281 N.W.2d at 352. Defendants also argued that their production of the film would be incriminating because it would assist the state in proving their knowledge of its obscene character. This argument requires further scrutiny. The officer who viewed the film apparently described it both by name and by content, and both were apparently included in the production order. *Id.* at 350, 352 & n.3. The defendants argued that production of the film would be "an admission of their belief that the film produced was the film

claimed it could prove who had possession or control of the film by other means, the court held that, absent a grant of immunity, production of the film would violate the fifth amendment, because possession or control was a real issue in the case.⁶² In so doing, the court expanded the rule of *Fisher* beyond situations where possession of the evidence is itself illegal to include those where it "is in issue in the case."⁶³

Two other cases illustrate the situation where possession is relevant to establish a link in the chain that will incriminate, even though it is not by itself illegal. In *Commonwealth v. Hughes*,⁶⁴ the

described in the order and, consequently, of their knowledge of the nature of the film." *Id.* at 352.

Possession of a named film does not by itself prove knowledge of its contents, but here the production order described the contents of the film. Even if the subpoena provided only a description of the contents of the film, and not the title, production would seldom incriminate in this fashion. Production of the film would demonstrate knowledge of the film's contents at the time of production, but such knowledge would not prove knowing past display of the movie. Moreover, production in response to a subpoena that requires future delivery of documents of a specific substantive description would be inadmissible to show that before the time of receiving the subpoena the defendant was aware of their contents. The inference would not satisfy a relevancy test and its incriminating impact would be de minimis. The *Alexander* court did not reach this issue.

At least one court, however, has held that any inference of knowledge of the contents of materials resulting from the act of production is too attenuated to warrant fifth amendment protection. In *People ex rel. Clancy v. Superior Court (Book Store)*, 161 Cal. App. 3d 894 (opinion deleted), 207 Cal. Rptr. 897 (1984), vacated sub nom. *People ex rel. Clancy v. Superior Court (Ebel)*, 39 Cal. 3d 740, 705 P.2d 347, 218 Cal. Rptr. 24 (1985), officers who had photographed books and magazines at a book store served a subpoena for named books and magazines on the store's owner in connection with an action to enjoin the sale of obscene material. *Id.* at 898-99.

The court found that "[t]he affidavits and declarations filed in support of the subpoena amply demonstrate that the 'existence, possession and authenticity' of the magazines are indeed a 'foregone conclusion.'" *Id.* at 902. The court specifically rejected the defendant's argument that producing the documents would assist the state in proving their personal knowledge of the content of the materials, as required for conviction under the state's penal statute, because the subpoena merely ordered them to *produce* the books and not "to open the books and peruse the contents." *Id.* at 903.

In reaching this result, the court apparently focused on the fact that, to the extent response to the subpoena required knowledge, it required only present knowledge of the contents of the books and magazines, which would be irrelevant to the issue of scienter under the state penal statute. Accord *Anderson v. Coulter*, 108 Ariz. 388, 391, 499 P.2d 103, 106 (1972) (subpoena ordering production of allegedly obscene film enforced because "ample evidence" of existence, identity, and authenticity were expressly shown and film was "properly identified"), cert. denied, 410 U.S. 990 (1973).

⁶² *Alexander*, 281 N.W.2d at 352.

⁶³ *Id.*

⁶⁴ 380 Mass. 583, 404 N.E.2d 1239, cert. denied, 449 U.S. 900 (1980); see also *Goldsmith v.*

defendant was charged with assaulting two men by firing shots at them.⁶⁶ After recovering a bullet, the state attempted to obtain from the defendant a weapon that it hoped to link by ballistics examination to the assault.⁶⁶ When it failed to locate the weapon through a search of the defendant's car, the prosecution obtained a court order requiring him to produce a "Smith and Wesson .38 Caliber Revolver Serial Number J354354,"⁶⁷ which he had earlier registered.⁶⁸ The defendant did not comply and was held in contempt.⁶⁹

The Supreme Judicial Court of Massachusetts ruled that the order violated the fifth amendment.⁷⁰ The incriminating potential of possession was obvious: the state acknowledged that it would use the defendant's production of the weapon "to show he had possession and control at some point after the alleged crime."⁷¹ Taken

Superior Court, 152 Cal. App. 3d 76, 199 Cal. Rptr. 366 (1984) (fifth amendment protects against compelled production of alleged murder weapon).

⁶⁶ *Hughes*, 380 Mass. at 583-84, 404 N.E.2d at 1240.

⁶⁷ *Id.* at 593, 404 N.E.2d at 1245.

⁶⁸ *Id.* at 584, 404 N.E.2d at 1240. This description of the item demanded is very specific. By contrast, if the order had required that the defendant produce the weapon he had in his possession on the day of the offense, it would have required a very clear implicit statement that would have directly authenticated the item. As the demand was phrased, it required no truth-telling, only the capacity to read serial numbers and respond. As this case illustrates, specificity and objective description can eliminate the testimonial aspect of production for authentication purposes, but they have no impact on the testimonial character of possession.

⁶⁹ State law required that the owner report any subsequent transfer of a registered weapon. The defendant had registered the gun described, but had not filed such a report. *Id.* at 585, 404 N.E.2d at 1240-41.

⁷⁰ *Id.* at 585-86, 404 N.E.2d at 1240-41.

⁷¹ *Id.* at 592-95, 404 N.E.2d at 1244-46. As a preliminary matter, the court ruled that the implied admission of possession was testimonial because possession and existence were not foregone conclusions, despite the state's contention that it could prove both through independent evidence. *Id.* at 592, 404 N.E.2d at 1244. The court here made a typical error, referring to both possession and existence when in fact it was concerned only with possession. The existence of the weapon was clearly a foregone conclusion, but the court indicated that the defendant's present possession was not. The state had conducted a futile search for the weapon, and while it hoped that Hughes might have the ability to produce the weapon, it apparently lacked solid proof of this. *Id.*

As this case illustrates, because of the defendant's ability to dispose of the item, the prosecution will rarely be able to establish that present possession is a foregone conclusion when it is relevant to proof of incriminating facts. The prosecution may obtain the item by granting use immunity or by showing that possession of the item is not incriminating, but it generally cannot do so by establishing that possession is a foregone conclusion.

⁷¹ *Id.*

together with the proof of ownership evidenced by the registration, this "would tend to establish possession at the critical time."⁷² The court made clear that it did not read *Fisher* to require that the mere possession of the item be incriminating.⁷³ As a result, it held that the state's claim that it could prove the defendant's possession beyond a reasonable doubt through independent evidence did not eliminate the incriminating quality of the admission of possession inherent in production.⁷⁴

In *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 & June 22, 1983*,⁷⁵ possession was similarly relevant to proof of a material issue. The witness, a former corporate president, was the target of a grand jury investigation concerning fraud in the company's petition for reorganization. Approximately one year after he left the company, he was served with subpoenas demanding that he produce all corporate records then in his possession.⁷⁶ He argued successfully that because he no longer had the right to possess the subpoenaed documents, his possession would create an inference of guilty knowledge:

⁷² Id. at 593, 404 N.E.2d at 1245.

⁷³ "We would see no distinction of constitutional dimension between production of what might be called corpus delicti and production of a thing which was a step or two distant but was nevertheless incriminating." Id. at 591 n.10, 404 N.E.2d at 1244 n.10.

In a very interesting portion of the opinion, the court went beyond the facts of the case to analyze the potential impact of a grant of use immunity with regard to the implied admission of possession, expressing doubt whether such a grant would have altered its judgment that the order was unconstitutional. Id. at 594, 404 N.E.2d at 1245. The court reasoned that the gun's location was not a foregone conclusion in the case; thus, the prosecution might use the evidence of location revealed by production derivatively or "mediately, to lead to ballistics tests and ballistics evidence" that would incriminate. Id. at 594, 404 N.E.2d at 1246.

The court's analysis of the limited effect of use immunity is in error. The authenticity and existence of a gun bearing a listed serial number are certainly foregone conclusions, and accordingly, the only testimonial consequence of production is possession. If the state grants use immunity for possession and eliminates any evidentiary inference that the defendant possessed the gun—by informing the jury, for example, that it was found in a remote location—the defendant is not incriminated by producing it. He may not successfully resist surrender of evidence simply because its substance is incriminating. See *infra* note 81 and accompanying text.

⁷⁴ The court explained:

It is as if we were asked to rule that a confession could be coerced from an accused as soon as the government announced (or was able to show) that [at] a future trial it could produce enough independent evidence to get past a motion for a directed verdict of acquittal.

Id. at 594, 404 N.E.2d at 1245.

⁷⁵ 722 F.2d 981 (2d Cir. 1983).

⁷⁶ Id. at 982-83.

[Possession] would tend to corroborate evidence that he misappropriated this evidence from [the company]; it would thus enable the government to argue in any criminal proceeding against him that his removal of the documents from the company's files amounted to a tacit admission that he had knowledge of their incriminating contents and absconded with them because he believed they were "smoking gun" evidence of his guilt.⁷⁷

But the facts in this case were unusual; the inference that the witness knew of the incriminating contents of the documents was far stronger than it would be in the typical case.⁷⁸ Where documents are held in a representative capacity by, for instance, the custodian of corporate records, the inference of guilty knowledge is normally weak. Although the ability to comply with the subpoena demonstrates that the custodian would have been able to obtain the documents, it does not, absent additional facts about the size of the organization or its practices with respect to documentary inspection by custodians, show knowledge or even prior possession. Thus, although it cannot be said that possession of such documents is never incriminating, the burden should be upon the defendant to demonstrate otherwise.⁷⁹

⁷⁷ *Id.* at 987.

⁷⁸ With respect to the testimonial issue, possession was not a foregone conclusion because the government did not know which documents the witness possessed. *Id.* at 986; see *supra* note 70.

⁷⁹ As a general matter, the court has the responsibility of determining whether the defendant's claim of reasonable fear of incrimination is sound; it is not bound by the defendant's assertions. If the circumstances of the case and the implications of the questions do not sufficiently establish the danger of incrimination, as is the case generally when a corporate custodian is compelled to produce corporate records, the witness bears the burden of providing further explanation. See *United States v. Edgerton*, 734 F.2d 913, 919 (2d Cir. 1984); see also *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (witness' "say-so" does not establish hazard of incrimination); *United States v. Neff*, 615 F.2d 1235, 1239-40 (9th Cir.) (if trial judge finds no self-incrimination threat on basis of circumstances of case, "it then becomes incumbent" upon defendant to show danger of incrimination), cert. denied, 447 U.S. 925 (1980); *United States v. Weisman*, 111 F.2d 260, 261-62 (2d Cir. 1940) (defendant may bear burden of proving that facially innocent questions are incriminatory).

Moreover, knowledge of the contents of documents is often either irrelevant to the issues in the case or subsumed in other issues. For instance, if a defendant's diary contains the statement that he murdered his wife, his possession of the diary might not be irrelevant, but its relevancy would be so trivial compared to proof of authenticity or existence that it would not be worth noting. Where guilty knowledge would be relevant to proof of criminal liability, however, personal possession of documents at least raises substantial issues of incrimination. See *Edgerton*, 734 F.2d at 919-20 (proof of existence and possession of specified financial records incriminates by showing knowledge relevant to prosecution for willful fail-

It is critical to understand that the communication of possession through the act of production implicates the fifth amendment only where the prosecution can introduce the witness' possession as evidence against him. When the prosecution obtains the item from the witness through the use of the subpoena but does not rely upon the fact of his possession to prove its case, the fifth amendment is not implicated. Possession within the meaning of the act-of-production analysis is a very narrow concept, for there are only a limited number of situations in which present possession incriminates the witness. Compelled admission of possession violates the fifth amendment only when possession in and of itself is testimonially incriminating, as where: (1) possession is itself a crime (e.g., the possession of contraband); (2) possession, which is not directly illegal, tends to establish possession at an earlier relevant moment; (3) possession shows guilty knowledge; or (4) possession helps to authenticate by circumstantially linking an item to its possessor.⁸⁰ In the vast majority of situations, possession itself has no significance, and because proof of it does not threaten incrimination, its implicit proof through the act of production is outside the protection of the fifth amendment.

In sum, admission of possession through production is significant under the fifth amendment only where it has incriminating potential apart from divulging to the prosecution information about the present location of the incriminating item. If revealing the present location of an incriminating document were sufficient to trigger the fifth amendment, the privilege would allow the witness to protect an item or document, absent a showing that its pre-

ure to file tax returns). But cf. *People ex rel. Clancy v. Superior Court* (Ebel), 39 Cal. 3d 740, 745, 705 P.2d 347, 349-50, 218 Cal. Rptr. 24, 26-27 (1985) (clerk holding allegedly obscene materials in representative capacity for artificial entity cannot assert privilege even if knowledge in issue).

⁸⁰ See *United States v. Porter*, 557 F. Supp. 703, 709-10 (N.D. Ill. 1982) ("[C]ompliance with the subpoena, by evidencing his control over [third-party documents] might provide sufficient circumstantial evidence of their authenticity."), rev'd on other grounds, 711 F.2d 1397 (7th Cir. 1983).

To illustrate this use of possession, imagine a subpoena demanding that the defendant produce all documents in his possession "belonging to" the victim of a theft—this obviously requires testimonial incrimination. If the subpoena instead specifically and objectively describes the items demanded—"Sears Credit Card #82625," for example—it might no longer require authenticating evidence directly, but production would still connect the defendant to the items and his possession, which leads to an inference of criminality, would constitute testimonial incrimination.

sent location was a foregone conclusion, simply because its contents were incriminating. Such a broad construction of the privilege would violate *Fisher's* holding that an item is not protected simply because its contents are incriminating. Instead, the act of production must itself create testimonial information that is incriminating—quite apart from the document's contents.⁸¹

3. *Existence*

The third testimonial element that may be involved in the act of production is proof of the existence of the document demanded by the subpoena. The major analytical issue is whether this communication is testimonial, not whether it is incriminating. As with authentication, if the document's contents are incriminating, the incrimination requirement is met.⁸² Thus, the fifth amendment is

⁸¹ An example will clarify this point. Assume the defendant possesses two diaries. One is his personal diary in which he recorded that he murdered the victim. The second is the victim's diary, which was stolen at the time of the murder. The implied admission of possession of the first is not testimonial; the fact of possession has no independent evidentiary significance. Possession is not incriminating if it only establishes that the prosecution can locate documents having incriminating *contents* from the defendant. Admission of possession of the victim's diary, however, would be incriminating because possession itself would incriminate.

This is the proper meaning of *Fisher's* statement that possession of the accountants' papers was not incriminating because their preparation and transfer to the taxpayers was not criminal. *Fisher*, 425 U.S. at 412. As the Court noted, the "Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate." *Id.* at 409.

⁸² Compelled testimony as to the existence of a document cannot be incriminating unless the contents of the document are incriminating. See *supra* note 45 and accompanying text. Therefore, this discussion assumes in all cases that the contents of documents demanded by subpoenas are incriminating.

Although issues concerning the existence of documents and their authentication often occur together, they are not necessarily linked. Where the prosecution does not know of the existence of a document authored by the witness, compliance with the subpoena will both authenticate the document and establish its existence. If the document was prepared by a third party, however, compliance with the subpoena will generally communicate only existence. On the other hand, if existence is a foregone conclusion, the question of authentication may remain, and it is not answered by prosecution knowledge concerning the existence of the document. But see *In re Grand Jury Empaneled on Jan. 17, 1980*, 505 F. Supp. 1041, 1043 (D.N.J. 1981) (if possession and existence are foregone conclusions, then authentication is not testimonial). Finally, a specific and detailed demand may eliminate the testimonial quality of the inquiry from an authentication perspective, see *supra* notes 30-43 and accompanying text, but leave open the question of existence. The government may be able to describe in detail the characteristics of an item because of the general character of such items, without knowing whether that particular item exists in the case. As a result, specificity in the wording of the subpoena may suggest knowledge by the prosecution of the docu-

violated if the act of production is testimonial because the government would be ignorant of the existence of such incriminating documents but for the act of production.

Whether this implied communication is testimonial does not turn, as it does in the case of authenticity, upon the specificity of the subpoena's demand.⁸³ For instance, the subpoena could call for the personal diary of the defendant for a period beginning and ending on specified days or demand all tape recordings made of telephone calls between the witness and specified individuals during a designated period of time. The problem with such a demand under the fifth amendment is not lack of specificity, but rather that the subpoena requires the witness to confirm that the documents exist in the first place. For this reason, specificity in the subpoena's demand will not eliminate the testimonial element. The critical question here is what the government knows: does revealing the existence of the document through its production inform the prosecution of a source of incriminating evidence of which it was previously ignorant?

*In re Grand Jury Subpoena Duces Tecum Served Upon John Doe*⁸⁴ illustrates this type of testimonial act. As part of its investigation of illegal payments from a shipper to labor union leaders, a grand jury asked the shipper to produce "all records of any kind received from certain named individuals in connection with or reflecting moneys paid or lent to or received from those persons."⁸⁵ The court concluded that producing records that contained evidence of payments, the existence of which the government suspected but could not prove, was testimonial because it "adds everything to the case. The target's possession of a note evidencing a debt is substantial evidence that such a debt existed and, in turn, that he committed a crime."⁸⁶

ment's existence but does not necessarily establish such knowledge.

⁸³ See supra note 82. Where the demand is overbroad or indefinite, it may violate due process or fourth amendment limitations upon subpoenas. See generally 1 S. Beale & W. Bryson, supra note 48, § 6:27, at 179 (although doctrinal basis is unclear, it is "now universally accepted that grand jury subpoenas are subject to challenge for overbreadth"); 1 W. LaFave & J. Israel, supra note 29, § 8.7(b), at 651 (although fourth amendment basis of protection is open to question, prohibition against overbroad subpoena is "not open to doubt").

⁸⁴ 466 F. Supp. 325 (S.D.N.Y. 1979).

⁸⁵ Id. at 326.

⁸⁶ Id. at 327.

*In re Katz (Jamil v. United States)*⁸⁷ provides another useful example. In that case, the subpoena ordered Katz, an attorney for Benjamin Jamil and the CCS corporation, to produce all public documents "relating to CCS or Jamil, or any company owned, operated or controlled by Jamil."⁸⁸ The witness provided public documents that on their face referred to Jamil or CCS but contested the requirement that he produce all documents "relating to any company owned, operated or controlled by Benjamin Jamil."⁸⁹

The government suspected that Katz had possession of certificates of incorporation of companies that were in fact owned or controlled by Jamil; it also believed that these certificates did not facially indicate any connection to him, listing instead dummy incorporators. Providing the documents in compliance with the subpoena would have confirmed that such documents existed, and if the corporations were involved in illegal munitions shipments, as the government suspected, this communication would have incriminated. Because the prosecution was ignorant of both the identity of these corporations and Katz' relationship to them, the court concluded that production of the certificates might well have added much "to the sum total of the Government's information."⁹⁰ As a consequence, it held that the district court had erred

⁸⁷ 623 F.2d 122 (2d Cir. 1980); see also *People ex rel. Bowman v. Woodward*, 63 Ill. 2d 382, 349 N.E.2d 57 (1976) (discovery order required the defendant to produce all unsuccessful scientific tests conducted during defense preparation).

⁸⁸ *Katz*, 623 F.2d at 123-24. Because an attorney-client relationship existed, the court examined whether the act of production would have been protected by the fifth amendment if Jamil had retained possession of the documents. *Id.* at 126 n. 2.

⁸⁹ *Id.* at 125.

⁹⁰ *Id.* at 126 (quoting *Fisher*, 425 U.S. at 411). The facts underlying the Supreme Court's decision in *Doe* may have involved similar issues, although the record is not clear that any question concerning the existence of the documents was actually present. In *Doe*, subpoenas commanded that the witness, a target of an investigation into corruption relating to the awarding of county and municipal contracts, produce a substantial list of records relating to the witness and several companies. *Doe*, 465 U.S. at 606-07 & n.1. The court of appeals referred to authentication, possession or control, and existence, finding that "[t]he most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government [is] unable to prove that the subpoenaed documents exist—or that the appellee even is somehow connected to the business entities under investigation." *In re Grand Jury Empanelled Mar. 19, 1980*, 680 F.2d 327, 335 (3d Cir. 1982), *aff'd* in part and *rev'd* in part sub nom. *United States v. Doe*, 465 U.S. 605 (1984) (footnote omitted).

At oral argument in the court of appeals, counsel for *Doe* asserted that the government had been unable to establish a connection between *Doe* and the businesses under investigation and that complying with the subpoena would provide information the government lacked—that *Doe* operated the businesses and held the bank accounts. *Id.* at 335 n.12. This

in denying the motion to quash without examining the documents, which had been submitted to the court under seal, to determine if production would have been testimonial and incriminating.⁹¹

In short, the extent of prosecutorial knowledge provides the key to the question whether admission of existence through the act of production entails, in any given case, testimonial conduct. That issue is directly addressed in the foregone conclusion concept created by the Court in *Fisher*. Although the concept may apply to each of the three communicative aspects of the act of production,⁹² it has its clearest and most important impact on whether the implied communication of existence is testimonial. Accordingly, the discussion below will analyze the foregone conclusion doctrine primarily in that context.

C. The Foregone Conclusion Doctrine

1. The Theoretical Basis for the Doctrine

In *Fisher*, the Supreme Court suggested that implicit admissions concerning the existence and possession of documents did not rise to the level of testimony protected by the fifth amendment where the substance of the admissions could be characterized as foregone conclusions.⁹³ The Court sketched the contours of this concept,

was a claim that production would prove possession or control, not existence.

In his brief in the Supreme Court, Doe repeated his possession argument, contending that no connection had been shown between him and the records, and argued that in this situation immunity must extend to the contents of the documents. Brief for Respondent at 6-7, *Doe* (No. 82-786); see also *id.* at 19-20 (“[T]he conclusion that this respondent possesses [the subpoenaed] records is pure speculation. The production of each document would admit its existence, a fact of which there is absolutely no proof the government is aware.”). At oral argument, the government flatly asserted that “there is no question in this case about who owns these companies,” as Doe had admitted the fact in the district court. Transcript of Oral Argument at 10, *Doe* (No. 82-786). Rather than contesting that assertion directly, Doe relied on the appellate court’s finding and shifted his ground, arguing that the government had failed generally to prove the existence of the documents. *Id.* at 34-35.

⁹¹ *Katz*, 623 F.2d at 126-27. The court remanded the case to the district court for an in camera inspection of the documents to decide whether the fifth amendment would have protected the documents in Jamil’s possession and whether their transfer to Katz was protected by the attorney-client privilege. *Id.*

⁹² In *Fisher*, the Court treated only possession and existence under this concept, see 425 U.S. at 411-12, but in *Doe*, the Court suggested that the government might use it to rebut a defendant’s self-incrimination claim with respect to all three elements, see 465 U.S. at 614 n.13.

⁹³ The authentication issue in *Fisher* can also be explained under the foregone conclusion concept. The Court in *Fisher* apparently assumed that the accountants who prepared the

which is without apparent antecedent in fifth amendment jurisprudence, with three general observations. First, "the Government is in no way relying on the 'truth-telling' of the [witness] to prove" these facts.⁹⁴ Second, the "existence and location of the papers are a foregone conclusion and the [witness] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers."⁹⁵ Third, existence and possession are not substantially at issue in the case.⁹⁶

The Court did not describe the foregone conclusion concept in terms of the traditional fifth amendment language of "testimonial self-incrimination," nor did it provide any explanation why communicative information becomes non-testimonial when the prosecution possesses other substantial proof on the issue.⁹⁷ One possi-

contested documents had no personal fifth amendment claims as to those documents, which the government knew existed, presumably from the accountants' own statements. Although the subpoena's description of the documents was not detailed, perhaps because the documents were not contained in a neat package, it was still objective, and any selection of the documents required of the defendant was unrelated to important issues in the case. When the neutral, objective nature of the description of the documents is combined with the fact that the government had at its disposal the accountants who knew their precise description and would be able to identify and authenticate them, the failure to describe the documents more precisely was of no consequence at all. The communication involved in production was not significant, just as if the prosecution had described the items with minute, objective detail and thereby required no discrimination by the defendants in selecting the documents. See *In re Grand Jury Subpoena of Fred R. Witte Center Glass No. 3* (*Witte v. United States*), 544 F.2d 1026, 1029 (9th Cir. 1976) (Kennedy, J., concurring) ("*Fisher* . . . concerned an accountant's working papers that were objectively identifiable. The testimonial assertion implied in the production of the documents was de minimis and, as such, was outside the purview of the fifth amendment."); see also *United States v. Schlansky*, 709 F.2d 1079, 1081 (6th Cir. 1983) (where prosecution described third-party records with objective precision, using information apparently provided by those who had prepared them, production required no meaningful testimonial act by the defendant), cert. denied, 465 U.S. 1099 (1984).

⁹⁴ *Fisher*, 425 U.S. at 411.

⁹⁵ *Id.*

⁹⁶ *Id.* at 411-12.

⁹⁷ Justice Brennan argued in his concurring opinion in *Fisher* that there is no recognized "Fifth Amendment principle which makes the testimonial nature of evidence . . . turn on the strength of the Government's case against" the defendant. *Id.* at 429 (Brennan, J., concurring). He made a similar argument with regard to the incrimination issue, contending that if the response to a subpoena supplies a "link in the chain of evidence against the [witness]," it is incriminating under the fifth amendment even if other testimony connects the defendant to criminal activity. *Id.*; see also *In re Grand Jury Empanelled Mar. 19, 1980*, 541 F. Supp. 1, 3 (D.N.J. 1981) ("If the act of production is testimonial, it does not cease to be so because of independent proof of the communications contained therein."), *aff'd*, 680 F.2d 327 (3d Cir. 1982), *aff'd in part and rev'd in part sub nom. United States v. Doe*, 465

bility, directly suggested by the Court's language,⁹⁸ is that the testimony inherent in production is irrelevant where the prosecution possesses abundant proof without it. Such an argument, however, flies in the face of the law of evidence. Under the Federal Rules of Evidence, if evidence tends to establish "any fact that is of consequence to the determination of the action," it is considered relevant even if that fact is not actually in issue.⁹⁹

Another inviting possibility is to analogize the foregone conclusion concept to the principle, well-established in incrimination analysis, that a de minimis threat of incrimination does not violate the fifth amendment.¹⁰⁰ But this effort to explain the foregone conclusion doctrine also fails, for incrimination analysis does not consider the presence or absence of other proof. To take one obvious example, a statement made by a defendant in response to police interrogation remains incriminating in fifth amendment terms even if the police already have other substantial evidence on the issue.¹⁰¹

U.S. 605 (1984); *State ex rel. Hyder v. Superior Court*, 128 Ariz. 253, 257, 625 P.2d 316, 320 (1981) (it is "not relevant that . . . the letters could be authenticated by some other means than through mention of . . . compliance with the subpoena") (footnote omitted); *Commonwealth v. Hughes*, 380 Mass. 583, 594, 404 N.E.2d 1239, 1245 (1980) (state's argument that act of production is "unworthy of Fifth Amendment protection because it merely enhances other persuasive evidence obtained without the defendant's help . . . is indeed curious").

As developed below, however, independent proof can eliminate the testimonial element of the act of production, but it cannot eliminate the incrimination element. See *infra* note 101 and accompanying text.

⁹⁸ The Court noted that it has allowed subpoenas against custodians of the records of collective entities despite the fact that production tacitly admits the records' existence and the custodian's possession of them. *Fisher*, 425 U.S. at 411. The Court compared the facts of *Fisher* to those cases and held that "[t]he existence and possession or control of the subpoenaed documents being *no more in issue* here than in the [custodian] cases, the summons is equally enforceable." *Id.* at 412 (emphasis added).

⁹⁹ Fed. R. Evid. 401. The Advisory Committee Note on this Rule states explicitly that "[t]he fact to which the evidence is directed need not be in dispute" for it to be admissible, and indicates that evidence should not be excluded on that basis. Thus, evidence that the Court would apparently hold unprotected under the fifth amendment could, under evidentiary rules, be admitted to corroborate a fact supported by other evidence.

¹⁰⁰ See, e.g., *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980); *Marchetti v. United States*, 390 U.S. 39, 53 (1968).

¹⁰¹ See *Commonwealth v. Hughes*, 380 Mass. 583, 593-94, 404 N.E.2d 1239, 1245 (1980). With regard to incrimination, the presence of other evidence operates like the government's decision not to use testimony obtained under compulsion. That decision may affect the defendant's remedy, but it does not eliminate the constitutional violation itself. The defendant has the right not to be compelled to make incriminating testimonial statements. He also has the right not to be placed in the "cruel trilemma" and required to decide whether to testify.

More plausibly, the Court is suggesting that when an implicit as opposed to an explicit communication is involved, it is necessary to consider whether the government is really asking a "question" through the subpoena. Granted, the defendant's response to a documentary subpoena always reveals that the item does or does not exist; the government cannot eliminate the implicit question about the document's existence no matter how it phrases the subpoena's demand. But if the government already knows the answer to that question and is truly uninterested in the implicit answer provided by production, the witness' gratuitous communication of it should not violate the fifth amendment.¹⁰² In short, the *Fisher* decision suggests that constitutional rights are not violated by implicit communications that are inherent in a response to a documentary subpoena where those communications are unwanted because, though technically admissible, they are not substantially relevant to the prosecution's case given its other evidence.

This position is only tenable, however, if the prosecution "in no way rel[ies] on the 'truthtelling' of the [witness] to prove" relevant facts¹⁰³—that is, it does not introduce the technically relevant but duplicative evidence secured through production to aid in the proof of its case.¹⁰⁴ Not only can the government not use the infor-

See Westen, Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense, 66 Calif. L. Rev. 935, 942 (1978); Westen & Mandell, To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response," 19 Am. Crim. L. Rev. 521, 521 (1982).

As discussed below, when interrogation is not explicit but is only implicit through the act of production, the availability of other proof can establish that the government is in fact asking no question at all. See *infra* notes 102-08 and accompanying text.

¹⁰² Take, for example, a compelled handwriting exemplar. When the defendant provides the sample, he necessarily communicates that he is able to write. See *Fisher*, 425 U.S. at 411. In the typical case, the government does not desire that information—it does not ask for it, nor does it wish to use it. But the prosecution cannot eliminate this communication from the act of producing the sample, and where the prosecution can establish the fact that the defendant can write by independent evidence, it should not bar production. Cf. *South Dakota v. Neville*, 459 U.S. 553, 562-64 (1983) (statement refusing to submit to blood-alcohol test, which the fifth amendment does not entitle one to resist, is not communication protected by fifth amendment, because it is not conduct compelled by the state).

¹⁰³ *Fisher*, 425 U.S. at 411.

¹⁰⁴ *United States v. Schlansky*, 709 F.2d 1079 (6th Cir. 1983), cert. denied, 465 U.S. 1099 (1984), provides a concrete example of this principle. There, the witness was required to produce records under a very detailed summons that required no judgment or truthtelling in his selection of the materials, only his objective conclusion that they were the ones described in the summons. *Id.* at 1083. The court nevertheless contemplated the possibility that the prosecution might attempt to use his production as evidence of authenticity, which would

mation implicit in production directly, but the information thus communicated may not provide the government with any additional knowledge that is potentially useful—the act of production must “add[] little or nothing to the sum total of the Government’s information.”¹⁰⁵ Only when the government meets these conditions can it rebut the witness’ claim that his fifth amendment rights will be violated by enforcement of the subpoena.¹⁰⁶

Thus the government must establish, before the subpoena can be enforced, that it has an alternative source of proof for the issue covered by the implicit communication; that it will not use the evidence directly to prove that issue; and that it gains no substantial new information by requiring production of the documents. By providing that information in advance, the prosecution demonstrates concretely that it does not care to know the answer to the implicit question posed by the subpoena. Because this showing permits the government to obtain—without affording the substantial protections of immunity—information that could well be testimonially incriminating, it should be detailed and exacting.

Although these requirements resemble the showing required under formal use immunity, the analysis of the foregone conclusion concept set forth here is intended to be distinct; it is not an argument for constructive immunity, which the Court explicitly disapproved in *Doe*.¹⁰⁷ This analysis simply suggests that the foregone

“add testimonial value to the otherwise testimony-free act of production.” *Id.* If the government attempted to make such use of the defendant’s response, it might violate the fifth amendment. *Id.*; see *Estelle v. Smith*, 451 U.S. 454, 464-65 (1981) (insanity examination considered testimonial because prosecution relied upon “substance of [the defendant’s] disclosures”).

¹⁰⁵ *Fisher*, 425 U.S. at 411.

¹⁰⁶ See *Doe*, 465 U.S. at 614 n.13.

¹⁰⁷ *Id.* at 616. In *Doe*, the Court rejected constructive immunity because “[t]he decision to seek use immunity necessarily involves a balancing of the Government’s interest in obtaining information against the risk that immunity will frustrate the Government’s attempts to prosecute the subject of the investigation.” *Id.* Given the need to reach a delicate balance, the Court was unwilling to intrude upon decisions that Congress had entrusted to the prosecution rather than to the courts. *Id.* at 616-17.

By contrast, foregone conclusion analysis imposes none of those risks upon the prosecution. The trial court decides in advance whether a sufficient showing has been made by the prosecution to support compelled production. Thereafter, the government cannot use the act of production directly to prove authentication, possession, or existence, but it is free from the danger of tainting a prosecution because of an error in the derivative use of the information obtained.

Under *Doe*’s holding, a number of cases are wrongly decided on the constructive immu-

conclusion doctrine is intelligible only if limited in ways that make it resemble use immunity.¹⁰⁸

nity issue. See, e.g., *United States v. Authement*, 607 F.2d 1129, 1132 (5th Cir. 1979) (per curiam) (compelled production of brass knuckles from defendant did not violate fifth amendment because communicative aspect of production was not used by prosecution); see also *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.) (en banc) (corporate custodian may move to suppress if government attempts to use the act of production at trial but may not resist production), cert. denied, 106 S. Ct. 594 (1985); *United States v. Davis*, 636 F.2d 1028, 1041 (5th Cir. Unit A Feb.) (possibility of implicit authentication not grounds for refusing to produce item if fact of compliance with subpoena not introduced into evidence), cert. denied, 454 U.S. 862 (1981).

¹⁰⁸ The resemblance between constructive immunity and foregone conclusion analysis and the failure of courts to analyze why the absence of a substantial dispute eliminates the testimonial aspect of production suggest that when courts make a foregone conclusion finding they are either improperly imposing constructive immunity or using result-oriented labels. In *In re Grand Jury Subpoenas Served February 27, 1984*, 599 F. Supp. 1006, 1016-17 (E.D. Wash. 1984), the trial court first rejected the government's offer of constructive immunity. In the same paragraph, though, it concluded that the government's affidavit concerning its independent ability to authenticate the documents rendered that issue a foregone conclusion. *Id.* Unfortunately the case, which is correctly decided, appears to reflect nothing other than result-oriented labeling by the trial court.

The foregone conclusion doctrine differs from standard use immunity analysis in several ways. First, the former requires the prosecution to provide a specific showing of its proof in advance of production of the documents. With use immunity, by contrast, the prosecution can obtain the evidence without any advance showing. Rather than satisfying the judge in advance that it possesses independent proof on an issue, it demands production and undertakes an obligation to show the independent nature of its proof if it later wishes to prosecute the defendant. Second, there is a clearly delineated standard and burden of proof on the government when use immunity is employed. With regard to foregone conclusion analysis, on the other hand, the standard the courts are to apply is unclear, although the burden clearly appears to be on the government. Unless the government demonstrates that the issue is a foregone conclusion, the witness can assert an apparently valid claim under the fifth amendment.

The foregone conclusion principle seems to provide less extensive protection from derivative use of information obtained from the defendant than formal immunity. Once the prosecution has demonstrated that the issue is a foregone conclusion, it is prohibited from making direct use of the evidence, which would be obvious to the court. Yet the government is not required to demonstrate that it has made no derivative use of the information, as it is when immunity is granted.

This is not to say that derivative use is irrelevant. The defendant could defeat the government's foregone conclusion argument by convincing the court that, because of derivative use possibilities, the prosecution had failed to make an adequate showing that production would communicate no useful data. One would expect, nevertheless, that such arguments would be less successful than would similar arguments under formal use immunity. Under formal immunity, scrutiny against derivative use is exacting. Under foregone conclusion analysis, it is only indirectly relevant in determining whether an issue is not sufficiently contested to eliminate the testimonial issue.

2. *The Showing Required to Establish a Foregone Conclusion*

In applying the foregone conclusion doctrine to the admission of existence inherent in production, the lower federal courts have split into two camps. One group appears to require only the most general showing that the government knows of the existence of documents of the character demanded. The facts are briefly sketched, and the court, "concluding" without explanation that the fact of existence is a foregone conclusion, enforces the subpoena.¹⁰⁹ The other group imposes a rigorous and exacting standard closer to the showing that this article contends is appropriate.¹¹⁰ Unfortunately, the courts in this second group have provided only limited explanation of the doctrine's application; they have simply declared that the subpoena is unconstitutional because it forces the witness to add "to the sum total of the Government's information"¹¹¹ and "requir[es] the [witness] to become, in effect, the primary informant against himself."¹¹² In addition, they tend to impose a standard of proof that is almost impossible for the prosecution to meet.

In *United States v. Fox*,¹¹³ the United States Court of Appeals

¹⁰⁹ See, e.g., *United States v. Fishman*, 726 F.2d 125, 127 (4th Cir. 1983) ("Being business records of Dr. Fishman, their existence in the circumstances of this particular case and his possession or control are self-evident truths . . ."); *United States v. Davis*, 636 F.2d 1028, 1041 (5th Cir. Unit A Feb.) (location and existence of long list of business-related documents declared not in issue without explanation), cert. denied, 454 U.S. 862 (1981); *In re Grand Jury Empanelled Feb. 14, 1978 (Markowitz)*, 603 F.2d 469, 477 (3d Cir. 1979) ("The fact that Markowitz, in his capacity as attorney for certain clients would hold documents of the type involved here is unremarkable."); *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir. 1977) (possession and existence of business documents declared, without explanation, not to rise to the level of testimony); see also *Fisher*, 425 U.S. at 432 (Marshall, J., concurring) (existence of corporate record books rarely in doubt so production "may fairly be termed not testimonial at all"); *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1055 (1st Cir. 1980) (testimonial content of production to establish existence of documents "in most cases will be so trivial that the Constitution is not implicated"); cf. *United States v. Beckman*, 545 F. Supp. 1284, 1285 (M.D. Fla. 1982) ("The summoned documents are ordinary records which many taxpayers retain for tax computation purposes. The act of admitting to the existence and possession of these ordinary records does not rise to the level of 'incrimination' necessary to invoke the Fifth Amendment.").

¹¹⁰ See, e.g., *United States v. Fox*, 721 F.2d 32, 37-38 (2d Cir. 1983); *In re Grand Jury Empanelled Mar. 19, 1980*, 680 F.2d 327, 335 (3d Cir. 1982), aff'd in part and rev'd in part sub nom. *United States v. Doe*, 465 U.S. 605 (1984).

¹¹¹ See *United States v. Fox*, 721 F.2d 32, 38 (2d Cir. 1983).

¹¹² See *In re Grand Jury Empanelled Mar. 19, 1980*, 680 F.2d 327, 335 (3d Cir. 1982), aff'd in part and rev'd in part sub nom. *United States v. Doe*, 465 U.S. 605 (1984).

¹¹³ 721 F.2d 32 (2d Cir. 1983).

for the Second Circuit followed the more rigorous approach, demanding that the prosecution provide detailed and specific proof of its knowledge. The subpoenas required the defendant, a physician, to produce all documents pertaining to the operation of his sole proprietorship during a particular tax year, including pass-books, records of financial accounts, and cancelled checks for the witness and his wife, as well as evidence verifying charitable contributions.¹¹⁴ The district court required the prosecution to set out the basis of its knowledge of the existence of these records.¹¹⁵ The government offered three types of evidence to support its contention that the existence of the documents was a foregone conclusion: information revealed on the witness' tax returns, the testimony of an IRS auditor about the business records of similar taxpayers, and records of certain third-party payments.¹¹⁶ The district court found this information sufficient to show that the issue was a foregone conclusion,¹¹⁷ but the Second Circuit disagreed.

The court of appeals imposed an extraordinarily rigorous standard of proof. First, it found irrelevant the auditor's information about the types of records generally kept by professionals like Dr. Fox: "We believe that the government's awareness of the practices of other taxpayers has nothing to do with the proper focus of this inquiry—i.e., what the act of production would reveal to the IRS about *this* taxpayer."¹¹⁸ Second, it required the government to demonstrate sufficient knowledge "to eliminate *any possibility*

¹¹⁴ See *United States v. Fox*, 554 F. Supp. 422, 423 (S.D.N.Y.), rev'd, 721 F.2d 32 (2d Cir. 1983).

¹¹⁵ See *United States v. Fox*, 549 F. Supp. 1362, 1367-68 (S.D.N.Y. 1982), later op., 554 F. Supp. 422 (S.D.N.Y.), rev'd, 721 F.2d 32 (2d Cir. 1983).

¹¹⁶ *Fox*, 721 F.2d at 37.

¹¹⁷ *United States v. Fox*, 554 F. Supp. 422, 425 (S.D.N.Y.), rev'd, 721 F.2d 32 (2d Cir. 1983).

¹¹⁸ *Fox*, 721 F.2d at 37. Some courts state this point more broadly, concluding that knowledge that a witness possesses a class of records—e.g., some bank account records—does not show that he has particular accounts. See *Butcher v. Bailey*, 753 F.2d 465, 469 n.4 (6th Cir.) ("While it is a foregone conclusion that some personal records, such as check stubs, exist, it may be that the existence of particular records is unknown. If that factual determination is made with respect to certain records, then production of those records would be testimonial for that reason . . ."), cert. dismissed, 106 S. Ct. 17 (1985); *In re Grand Jury Subpoenas Served Feb. 27, 1984*, 599 F. Supp. 1006, 1015 (E.D. Wash. 1984) ("While it may be a 'foregone conclusion' . . . that most individuals possess records relating to credit cards, telephone bills, and bank accounts, it is not a 'foregone conclusion' as to specifics of these general categories.").

that Fox's production would constitute an incriminating testimonial act," a standard the government had failed to meet.¹¹⁹ The court concluded that production by the defendant might provide the government with new information relating to unreported taxable income, bank accounts other than those noted on his returns showing additional unreported income, and the absence of documents to support all of his claimed business deductions.¹²⁰ Accordingly, the court held that compliance with the subpoenas would add to the sum total of the government's information and ruled that its enforcement would constitute compelled testimonial compulsion.¹²¹

The courts that require an exacting showing, like the Second Circuit in *Fox*, take a generally proper approach. But they require

¹¹⁹ *Fox*, 721 F.2d at 37-38 (emphasis added). In *Doe*, the Supreme Court left undisturbed the court of appeals' finding that the government's knowledge was inadequate to establish that existence, possession, and authenticity were foregone conclusions. See *Doe*, 465 U.S. at 613-14 & n.13. The court of appeals had set out an extraordinarily tough standard with regard to possession of the documents: "[W]e find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded" is possessed or controlled by the witness. In re Grand Jury Empanelled Mar. 19, 1980, 680 F.2d 327, 335 (3d Cir. 1982) (emphasis added), aff'd in part and rev'd in part sub nom. *United States v. Doe*, 465 U.S. 605 (1984). This standard appears almost impossibly demanding. As discussed below, courts should use a tough but realistic standard that takes into account the purposes of the foregone conclusion finding.

The court in *In re Grand Jury Subpoena Duces Tecum (Passports)* Dated June 8, 1982, 544 F. Supp. 721 (S.D. Fla. 1982), appeared to require a much lower standard of proof as to existence—a *prima facie* showing. The subpoena called for production of the witness' passport. *Id.* The government introduced proof that a passport was issued to him; the court held that this constituted *prima facie* proof that it still existed. *Id.* at 724. But existence was not even truly in issue in the case, and if it had been, the government's showing was sufficient to meet almost any standard. Existence was established to a certainty by proof that the passport had been issued. The contested issue was present possession. And because present possession was not incriminating under the standards discussed earlier, see *supra* note 81 and accompanying text, the fifth amendment was inapplicable.

¹²⁰ *Fox*, 721 F.2d at 38.

¹²¹ *Id.* Some courts have required specific proof of the government's knowledge. In *In re Grand Jury Subpoenas Served February 27, 1984*, 599 F. Supp. 1006, 1015-16 (E.D. Wash. 1984), the district court required the government to detail its information concerning the existence of specific bank, credit card, and credit accounts and telephone numbers. Upon that showing, it found production of documents concerning those items would not be self-incriminating, as their existence was a foregone conclusion. See *In re Grand Jury Subpoena Duces Tecum* Dated Nov. 13, 1984 (*Doe*), 616 F. Supp. 1159, 1161 (E.D.N.Y. 1985) (government demonstrated knowledge that witness kept set of partnership books and had two bank accounts); *Apache Corp. v. McKeen*, 529 F. Supp. 459, 461 (W.D.N.Y. 1982) (witness may be required to produce records of corporations where government demonstrates by specific information that he is "connected with" them).

too much. It should not be sufficient for the government simply to demand a laundry list of records possessed by most businesses, as it did in *Doe*. The government should, however, be able to secure enforcement of a subpoena for such records by demonstrating that all similar businesses do in fact keep some records of the type sought—telephone records, ledgers, financial accounts, etc. By contrast, such general proof should not be sufficient to support a subpoena, whether facially specific or broadly worded, for business records that are more unusual, like a second set of books or records of a foreign bank account. The government should be able to compel production of such records only upon a particularized showing that they were kept by the specific witness' business.

The showing required by the foregone conclusion concept should be determined by the practical concerns that generated the doctrine. The foregone conclusion concept was created because implicit communications are always present in the production of documents, though the government may find that information of no real value, given its other evidence. The prosecution is often interested only in the contents of the subpoenaed documents, which the defendant has no right to protect, and their production should not be blocked by the presence of the technically relevant but practically insignificant communications inherent in the act of production.¹²²

In practice, the information actually conveyed by production may prove more useful than the government had initially assumed. Once the information has been surrendered, however, the witness is unprotected against all but direct use of it.¹²³ For this reason, courts should be cautious and exacting in applying the doctrine

¹²² In its presentation to the Supreme Court in *Doe*, the government repeatedly argued that litigation about whether the act of production violates the fifth amendment is part of a phony war, because neither side cares about the communications involved in production. Rather, they are interested only in the contents of the documents, which are not protected. See, e.g., Brief for the United States at 10-11, 31, 37, 43, *Doe* (No. 82-786).

There is much merit to the government's general point, and it should help to guide courts. When the real concern is not the possible existence of documents but merely their contents, production should not be blocked by an artificial issue. When the government is ignorant of the document's existence or another communicative aspect of the act of production, however, compliance with the subpoena will implicate the fifth amendment. The privilege is not inapplicable simply because the contents of the documents are also of concern to both parties.

¹²³ See *supra* note 108.

when the issue to which the implied communication relates is in actual contest, especially when it is central to the litigation. They should be careful to consider the potential dangers of improper use. In sum, taking a cue from the rigorous standards for proving an independent source for formal immunity, courts should require actual proof of sufficient independent prosecutorial knowledge, not mere generalities, before finding the foregone conclusion exception applicable. In general approach, this is much what the Second Circuit did in *Fox*. But in contrast to the overly exacting standard used in *Fox*, the extent of the required showing should remain realistic.

The same type of analysis should apply to the other potentially testimonial aspects of production—authentication and possession.¹²⁴ As with existence, if the government has demonstrated that the issue is a foregone conclusion, the communication should fall entirely outside the fifth amendment. The consequences of the government's *failure* to demonstrate that the issue is a foregone conclusion, however, are critically different for authenticity and possession than they are for existence. In the former case, the al-

¹²⁴ Some courts treat the authentication issue differently than possession or existence, appearing to exclude it entirely from the application of the foregone conclusion concept, particularly when the documents involved were prepared by the witness. See *United States v. Edgerton*, 734 F.2d 913, 923 n.13 (2d Cir. 1984) (suggesting that even if the government could prove the existence and possession of self-prepared documents, only use immunity could eliminate the authentication issue); see also *United States v. Greenleaf*, 546 F.2d 123, 126 n.7 (5th Cir. 1977) (possession and existence are foregone conclusions, but authentication is presumed different because defendant is able to authenticate documents).

Because authentication is a prerequisite to admitting documents, it is necessarily an issue in every case. When documents have been prepared by the witness himself, production alone is generally sufficient to warrant admission and constitutes an important contribution to the prosecution's case. See *infra* note 126. Production is clearly testimonial and relevant to an issue in the case. Furthermore, the foregone conclusion concept operates in this context in a fashion so similar to that of the repudiated concept of constructive immunity that courts should be hesitant to use it as an alternative to the more complete protections of formal immunity.

Under proper analysis, the foregone conclusion doctrine should be applicable even to authentication of documents personally prepared by the defendant. See 1 S. Beale & W. Bryson, *supra* note 48, § 6:33, at 208-09 (treatment of outcome fundamentally sound but issue erroneously treated as whether sufficient incrimination shown.). Before authentication is treated as a foregone conclusion, however, the government's showing should be very strong and the court must be confident that the prosecution can make no improper derivative use of the information. As noted above, see *supra* note 93, *Fisher* provides a good example of a fact pattern where authenticity may quite properly be treated as a foregone conclusion.

ternative method for obtaining the documents—formal use immunity—will not seriously impede the prosecution's use of them, whereas in the latter it will often effectively immunize the documents' contents.

D. The Consequences of Granting Use Immunity

When it grants immunity, the prosecution cannot use the responses of the witness either directly or derivatively. In addition, it bears an "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."¹²⁵ This duty to rebut the possibility of impermissible derivative use is a major task for the government.

With respect to the authentication and possession components of the act of production, the problems presented by use immunity are manageable, though technically challenging. By contrast, the impact of immunity with regard to existence—where the prosecution would have been ignorant of the document but for the act of production—is broad and far-reaching.

1. Immunity as to Authenticity and Possession

A witness' production of a document is normally sufficient to authenticate it.¹²⁶ When the prosecution has secured the document through a grant of use immunity, however, it must supply authentication evidence entirely independent of the act of production. In practice, the prosecution must act with care if it is to avoid making impermissible use of the act of production. Take as an example a subpoena that requires a named individual to produce all documents relating to "accounting services performed by you or under your supervision" on behalf of certain named individuals.¹²⁷ The government will know by the act of production that the documents were prepared either by the individual to whom the subpoena was

¹²⁵ *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

¹²⁶ When the document was prepared by the witness, production under most subpoenas will fully authenticate it. See, e.g., *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1056 (1st Cir. 1980) (records prepared under doctor's direction and in his possession sufficiently authenticated by production to permit introduction in evidence); *United States v. Plesons*, 560 F.2d 890, 893 (8th Cir.) (production of patient records personally prepared by defendant would authenticate them), cert. denied, 434 U.S. 966 (1977).

¹²⁷ See *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 531 (3d Cir. 1985) (en banc) (Becker, J., concurring) (emphasis omitted).

delivered or by others under his control.¹²⁸ Armed with that information and the documents produced, it may proceed to locate persons who either observed the individual preparing the documents or prepared them themselves under his supervision and are thus able to authenticate them. But this would make improper derivative use of the information secured through the grant of immunity.¹²⁹

The prosecution can, however, eliminate the possibility of improper derivative use of the admission of authenticity inherent in production.¹³⁰ Presumably it had solid information that the documents existed,¹³¹ and it suspected—if it did not “know”—that the witness was intimately involved in their preparation. Consequently, it may set out in advance the sources it will employ to authenticate any documents produced in response to the subpoena. It could, for instance, list the coworkers and others it will interview once it has possession of the documents. Providing this proof would require the prosecution to engage in some minimal case analysis relatively early in its investigation, but would not seriously inconvenience it.

¹²⁸ Contrast this to the situation where the government receives the documents from an unidentified source. In *Doe*, the government argued that use immunity would put it “in the same position as if it had obtained the documents by means other than the defendant’s act of production, i.e., as if the documents or tangible objects obtained had been found on the street or had arrived in the mail from an anonymous sender,” Reply Brief for the United States at 10, *Doe* (No. 82-786).

¹²⁹ But see 1 S. Beale & W. Bryson, *supra* note 48, § 6:33, at 211 (arguing that absence of causal connection between act of production and employee’s authenticating testimony makes alternative method of proof independent and not derivative).

¹³⁰ The argument has also been made that the procedures involved in granting formal use immunity under 18 U.S.C. §§ 6002-6003 (1982) are unnecessarily burdensome and impose needless delay on grand jury action. See Brief for Respondent at 46, *Doe* (No. 82-786); see also *United States v. Kilpatrick*, 594 F. Supp. 1324, 1336-37 (D. Colo. 1984) (prosecution conceded that it chose informal rather than formal immunity “for the sake of expediency—to by-pass the review procedure established by Congress”). Such arguments should not be given any weight in determining whether immunity is the appropriate solution under the fifth amendment. The ability to grant immunity is tightly restricted by the statute because of immunity’s potentially adverse impact on pending and future prosecutions. Even if the current system is too cumbersome, this does not justify compromising the fifth amendment rights of individuals. Instead, legislative changes can strike the balance differently between competing prosecutorial interests.

¹³¹ Often the government has sufficient knowledge of the existence of a document to satisfy the foregone conclusion test, even though its proof of authentication is weak. Immunity may accordingly be extended to authenticating evidence without necessarily extending to the fact of the document’s existence.

To be sure, granting use immunity with respect to production's implicit communication of authenticity is not without its difficulties, for careless or unthinking grants of immunity, even on such a limited issue, can jeopardize the prosecution of the immunized individual. But the requirement that the prosecution introduce independent proof to eliminate the possibility of improper use seems a modest price to pay for the protection of a witness' fifth amendment rights. If such a showing is not required, then the authentication evidence derived from the act of production may well be used against the witness, though he may be subsequently unable to prove that this has happened. If, on the other hand, the prosecution demonstrates, before production is compelled, that it has sufficient independent evidence to authenticate all documents it seeks, then the witness' fifth amendment rights have been adequately protected, for the prosecution has no reason to use the evidence against him.

A grant of immunity as to the communication of possession does not implicate the complex problems of derivative use.¹³² Where possession of the item is incriminating—because possession is itself illegal, as with contraband, or because it is relevant to proof of a material issue, as where it suggests guilty knowledge of the item's contents—the prosecution may not use the fact that the defendant possessed the items directly as evidence against him.

Granting use immunity for the communications of authenticity and possession does not immunize the contents of the documents themselves, but only the communicative conduct leading to proof of authenticity or possession.¹³³ If the government can establish the authenticity of the document by independent proof, it may be introduced against the defendant. A document's contents are not

¹³² Derivative use of possession is of no concern because the testimonial communication of possession inherent in production has very limited incriminating potential. In the few instances where this communication is actually incriminating, see *supra* notes 80-81 and accompanying text, it may be used directly, rather than derivatively. To illustrate, although government use of the contents of a document secured through a subpoena may on first examination appear to make derivative use of the act of production, it does not involve exploitation of the communication of possession implied in that production. Instead, production simply allows the government to acquire access to the document. Cf. *United States v. Rylander*, 460 U.S. 752 (1983) (in contempt proceedings, fifth amendment claim insufficient to satisfy defendant's burden of proof that he no longer possesses the documents demanded).

¹³³ See *Doe*, 465 U.S. at 617 n.17.

immunized merely because the prosecution came into possession of the document through the subpoena.¹³⁴ Thus, immunity with regard to authenticity or possession does not have significant costs in terms of evidence lost.

2. *Immunity as to Existence*

A grant of use immunity as to the implied communication of existence, by contrast, has more far-reaching consequences. In most instances, granting use immunity when the existence of the document is not known to the prosecution will in effect immunize the witness against any use of its contents. Indeed, it may actually result in transactional immunity for him, if the document is essential to his prosecution. Such problems are the primary reason why use immunity is not the easy solution to meritorious self-incrimination claims generated by the act of production. Unfortunately, the case law has not yet begun to explore these difficult issues.

When the witness is granted immunity with regard to the existence of a document, the logic of immunity analysis appears to require that, absent an entirely independent source for that document, its contents cannot be used against the witness. Immunity clearly prevents the prosecution from using the communicative act of revealing the existence of the document against the witness, either directly or derivatively. But any use of the information in the document depends critically, indeed fully, upon derivative use of the disclosure that the document exists. To obtain the document, the prosecution must exploit the fact of existence gained through the act of production, a fact of which it would otherwise have remained ignorant.

Effectively immunizing the content of a document in order to protect the act of production appears extraordinary because it may deny the government all use of the document. It is not surprising, however, that use immunity going only to the act of production would eliminate all value of production. Take a hypothetical posed during the oral argument in *Doe*. The government is attempting to identify which of ten suspects is the silent partner in a shady business; it believes that the unknown partner possesses some of the organization's records. The government can identify those records

¹³⁴ See *supra* note 81 and accompanying text.

because it has obtained many of them from a known partner, and it knows that they do not identify the silent partner by name. It subpoenas copies of these facially neutral documents from each of the ten suspects.¹³⁵

If one of the ten produces the records, he identifies himself as the silent partner. If he chooses to assert his fifth amendment privilege instead, the government may still secure the records by granting him immunity for the act of production. Although the contents of the records thus obtained are not technically immunized, the government cannot use them in any way in the prosecution of the silent partner because it cannot connect them to him without relying on the act of production.

The result should be no different if the government does not know to what enterprises a single suspect might be secretly connected but issues a subpoena that requires him to produce the records of any enterprise in which he is a silent partner. Assume, as in the above example, that the records themselves contain no information that would link the suspect to the enterprise. The government does not know that such records exist, and if it obtains them through the subpoena, cannot link them to the suspect without using the act of production. Once again, if immunity were granted, the documents' contents would be available for use to prove facts about the enterprise, but they would be useless against the suspect.¹³⁶

When existence is unknown, immunity as to existence should extend to the contents of the documents, even if the documents themselves, once produced, would lead the prosecution to the defendant. Assume the subpoena demands production of all records involving foreign banks or all written communications between co-defendants who are widely known to be friends and associates. Assume that the documents themselves will contain information identifying the banks or the defendants. Thus, if the government were to find these documents on the street, it could connect them to the defendant using the contents of the documents.

¹³⁵ See Transcript of Oral Argument at 10, *Doe* (No. 82-786).

¹³⁶ This result can be appreciated by viewing the facts another way. Assume the records are treated as if the government had found them on the street. See *supra* note 128. The contents of the records would not be useful unless the government had some information as to who put them there.

Because the government is ignorant of the existence of these documents, the grant of use immunity should protect the defendant from any use of their contents against him, unless the government demonstrates an independent source for its knowledge of their existence. To illustrate, assume that the defendant is not asked to provide testimony about the existence of the unknown documents through the act of production, but instead to testify orally before the grand jury. The grand jury asks whether he has such documents and, if so, where they are located. In response, the defendant asserts his privilege against self-incrimination, arguing that his answers would permit the government to obtain incriminating evidence—the documents' contents. The claim of privilege would be valid. Any reasonable definition of illegal fruits of compelled interrogation would prevent the government from obtaining these documents through the information provided by the defendant.¹³⁷

The government responds that it will provide the defendant with formal use immunity, but argues that this immunity should extend only to the communicative content of his oral testimony and not to the contents of the documents, because the documents are preexisting. Thus limited, immunity puts the defendant in the same situation as if the documents had been found on the street somewhere—what he says is immunized, but the documents themselves may be introduced against him at trial.

The government's argument on the scope of immunity would certainly fail. The defendant had an initially valid claim of privilege, and the scope of immunity proposed does not effectively eliminate the possibility of improper derivative use. The same result should logically follow where the testimony as to existence is communicated through the act of production rather than oral testimony.¹³⁸ By supplying the documents, the defendant would be an-

¹³⁷ The defendant's statements are not merely a "but for" cause of the government's acquisition of them. The government would obtain them through exploitation of the primary illegality. See *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

¹³⁸ Treating the documents as being located on the street does not change this result. It has no more impact than telling the defendant that he may respond to the government's inquiry either by producing the records or by placing them in the street, where they would not have been and where the government would not have looked for them except for the subpoena's demand for production.

swering the government's questions about whether they exist and are located in his immediate possession.¹³⁹

Where the very existence of the documents is itself incriminating and the government cannot establish existence except through the act of production, it is easy to see why use immunity must effectively immunize their contents. Demands to produce records of purchases, trades, sales, receipts, gifts, and distributions of controlled substances¹⁴⁰ and documents reflecting payments or loans from named suspected co-defendants in a labor racketeering case¹⁴¹ provide notable examples. The phrasing of the subpoena's demand requires the defendant to repeat the incriminating contents of the documents in the act of production,¹⁴² admitting their existence is itself directly incriminating. Any grant of immunity would certainly eliminate direct use of the fact of existence, and should also prohibit governmental use of the documents' contents,

¹³⁹ Admittedly *Doe* may be read as rejecting the position that where the existence of incriminating documents is actually in issue, immunity will have the effect of immunizing their contents. See *Doe*, 465 U.S. at 617 n.17. In his brief, *Doe* made a similar but broader argument in two short paragraphs. See Brief for Respondent at 7, 24-25, *Doe* (No. 82-786). He argued that immunizing the contents was required when possession, control, or existence had not been established by the government. *Id.* At oral argument, he argued that if immunity "extends to the fact that those documents are in existence, it must necessarily extend to the contents of the documents." See Transcript of Oral Argument at 35, *Doe* (No. 82-786). Beyond stating his position, however, *Doe* provided no explanation or examples to show why his contention was valid. See *id.* at 34-36. Furthermore, he made a broader argument, contending that the contents must be immunized when existence is at issue. See *id.* at 36. As it did with the government's contention that possession and existence of standard business records are foregone conclusions, see *supra* note 29, the Court rejected the broadest form of *Doe*'s immunity argument: "Respondent argues that any grant of use immunity must cover the contents of the documents as well as the act of production. We find this contention unfounded." *Doe*, 465 U.S. at 617 n.17. The Court's treatment of the issue certainly lends no support to the position advocated in text, but just as surely, *Doe* does not definitively resolve the issue. See *Fisher*, 425 U.S. at 433-34 (Marshall, J., concurring) (making similar argument); *infra* note 145.

¹⁴⁰ See *United States v. (Under Seal)*, 745 F.2d 834, 835 (4th Cir. 1984), cert. granted sub nom. *United States v. Doe*, 469 U.S. 1188, vacated as moot, 471 U.S. 1001 (1985).

¹⁴¹ See *In re Grand Jury Subpoena Duces Tecum Served Upon John Doe*, 466 F. Supp. 325, 327 (S.D.N.Y. 1979), discussed *supra* notes 84-86 and accompanying text.

¹⁴² The Court noted in *Fisher* that because the summons did not "compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought[.], . . . the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer." 425 U.S. at 409. Here, because of the nature of the subpoena's demand, the defendant would be required to restate the contents, and the fifth amendment would be violated by the fact of their incriminating contents.

because they merely set out in more detail what the defendant has been forced to reveal through production.¹⁴³

¹⁴³ The facts of *United States v. (Under Seal)*, 745 F.2d 834, 835 (4th Cir. 1984), cert. granted sub nom. *United States v. Doe*, 469 U.S. 1188, vacated as moot, 471 U.S. 1001 (1985), provide an example of a case where granting use immunity would result in effectively immunizing the contents of the documents because the government lacked knowledge that they existed. In that case, a grand jury investigating an individual for narcotics, tax, and currency violations demanded by subpoena that the defendant produce corporate records, business records of his sole proprietorship, and certain other documents that the court termed "personal." He produced records in the first two categories but refused to provide the personal records. See *id.* at 835-37. As to the latter, the subpoena demanded that he produce "records of purchases, trades, sales, receipts, gifts and distributions of controlled substances." *Id.* at 836 n.2. The government granted formal use immunity for their production. *Id.* at 837 & n.4.

The United States Court of Appeals for the Fourth Circuit refused to enforce the subpoena, albeit on untenable grounds. It held that the rationale of *Boyd* applied to protect the contents of the business documents of a sole proprietor. *Id.* at 840 & n.12. Although the Supreme Court's decision in *Doe* settled very few issues, the opinion clearly rejected that argument. See *Doe*, 465 U.S. at 610-12. Nevertheless, because the court of appeals refused to order production of the documents, the consequences of granting immunity were never examined.

Producing the documents would have been testimonial and incriminating in two respects. First, production would have proved authenticity. Much more critically, it would have established the existence of the documents. While the government may have expected to prove beyond a reasonable doubt that the defendant did engage in such illegal transactions, the incriminating element of these documents would certainly not be *de minimis*. Furthermore, there is no indication that their existence was a foregone conclusion.

Under the argument set forth here, any subsequent use of the documents in (*Under Seal*) would be a fruit of that implicit testimony; accordingly, the government would be barred from any use of them against the witness. As under *Boyd*, the contents of the documents could not be used by the government in any way against the defendant. The documents would be subject to subpoena, however, because the witness' fifth amendment right to oppose production had been eliminated by the grant of immunity. See *In re Sealed Case*, 791 F.2d 179, 182 (D.C. Cir. 1986) (court must order production of tape recordings when witness has been granted immunity, even if it believes that all subsequent uses of the tapes against the witness would be tainted).

The scope of protection under the act-of-production doctrine would be related to, but clearly distinct from, that advocated by Justice Marshall in *Couch v. United States*, 409 U.S. 322, 350 (1972) (Marshall, J., dissenting), and Justice Brennan in *Fisher*, 425 U.S. at 424-27 (Brennan, J., concurring). Under the act-of-production analysis, the issue is not whether the records contain the "author's personal thoughts [which] lie at the heart of our sense of privacy," *Couch*, 409 U.S. at 350 (Marshall, J., dissenting), are "an extension of the person," *Fisher*, 425 U.S. at 426 (Brennan, J., concurring), and reflect the witness' reasonable expectation of privacy, *id.* at 424-25. Rather, the privilege is available if the contents of the document are incriminating, if the document is possessed by the defendant, and if its existence is sufficiently in doubt that it is not a foregone conclusion.

The scope of protection under *Boyd* and the act-of-production doctrine will differ, however, as can be seen by exploring one of the examples given by Justice Marshall. He would see no bar under the fifth amendment to "the seizure of a letter from one conspirator to another." *Couch*, 409 U.S. at 350. Such a document would be protected under an act-of-production analysis if demanded from either conspirator, even though it would not reflect the author's personal thoughts or be strictly confidential.

Immunity as to existence would not, of course, immunize the witness from the entire transaction; it would only immunize him against any use of unknown documents absent an independent source of evidence that they exist. Furthermore, the contents of the documents would not be directly immunized: the government could use them against another person,¹⁴⁴ and it could even use them against the witness himself if it could prove their existence with independent evidence.¹⁴⁵ Use against the witness himself should be rare, however, for if the government had independent knowledge of the documents' existence, it would presumably have avoided the fifth amendment problem by showing that existence was a foregone conclusion, thus eliminating the need to grant immunity.¹⁴⁶

The above analysis demonstrates why a showing that the existence of documents is a foregone conclusion is so critical for prosecution use of the documents. With such a showing, the fifth amendment becomes all but irrelevant. Absent it, the government has no effective alternative means of obtaining the document for use against that witness. This is the proper result, though, for

¹⁴⁴ The government's right to use documents obtained under immunity against others is very significant. For instance, when the prosecution seeks corporate records, the custodian or another low-level figure may be asked to furnish an array of documents, many of which the prosecution may not know exist. Even if the contents may not be used against the custodian—and the majority view is that they are available for use even against him, see *infra* notes 148-285 and accompanying text—they would be fully available for use against all others in the corporation. Thus a subpoena directed to the custodian allows the prosecution to go on a relatively extensive "fishing expedition," constrained only by lenient due process or fourth amendment limitations on subpoenas.

¹⁴⁵ Proof of an independent source is all that is required under *Kastigar v. United States*, 406 U.S. 441 (1972), even though the standard of proof is high. *Id.* at 460; cf. *Nix v. Williams*, 467 U.S. 431 (1984) (inevitable discovery). By contrast, if the document itself—as opposed to the act of production—were immunized, a showing of an independent source would still not permit its use. Cf. *United States v. Pimentel*, 626 F. Supp. 1372, 1374 (S.D.N.Y. 1986) (inevitable discovery permits use of fruits of illegal seizure such as facts contained in document when obtained from other sources but not the document seized itself). Thus, the Supreme Court's rejection in *Doe* of the argument that use immunity would immunize the contents of the document, see 465 U.S. at 617 n.17, was strictly accurate and does not conflict with the construction of the scope of immunity developed in this article.

¹⁴⁶ Proof of an independent source is, however, conceptually possible when the prosecution is able to prove that it had prior knowledge of existence, but failed to make such a showing. Use of the contents might also be permissible if the prosecution makes the type of showing required under the inevitable discovery doctrine. See *Nix v. Williams*, 467 U.S. 431 (1984).

when existence is not a foregone conclusion, the defendant has a valid claim that the privilege against self-incrimination will be violated by *any* use of the document against him.¹⁴⁷

II. THE ARTIFICIAL ENTITIES EXCEPTION

Subpoenas for documents directed at artificial business entities, including corporations and such other important economic institutions as partnerships and labor unions, are treated in a radically different manner than those served on individuals. This "artificial entities" exception¹⁴⁸ to the fifth amendment has two parts. First, the artificial entity itself may not resist a subpoena on the grounds of self-incrimination. Second, a representative of the entity may

¹⁴⁷ Because the case law has treated this area so summarily, it has not examined how far the prohibition against derivative use extends when applied to the contested issue of whether a document exists. One of the critical unanswered questions is whether a corporate representative's admission that corporate documents exist would constitute testimonially incriminating evidence against him personally.

The Second Circuit has preserved most of the artificial entities exception while acknowledging that the act-of-production doctrine would supplant the exception when the two are in direct conflict. The court achieves this result by recognizing only a very limited scope of incrimination as resulting from production of documents by a custodian. This view is absolutely valid in some circumstances. For example, showing possession by the corporation may not show that the custodian personally possessed the item at a relevant time or ever knew its contents. See *In re Grand Jury Subpoenas Duces Tecum* Dated June 13, 1983 & June 22, 1983, 722 F.2d 981, 986-87 & n.5 (2d Cir. 1983); *supra* note 55.

In many fact situations, however, production of documents will personally incriminate the custodian by showing authenticity, which would permit introduction of the documents against him at trial, and particularly by establishing the existence of unknown documents that will show his personal criminality. See Note, *Fifth Amendment Privilege for Producing Corporate Documents*, 84 Mich. L. Rev. 1544, 1556 (1986) ("Admissions implicit in producing records do not lose their testimonial quality if the records belong to a corporation rather than to an individual." Under this argument, contrary to the position of the Second Circuit, the act-of-production doctrine and the artificial entities exception to the fifth amendment should produce different results in a number of limited but important situations. See *infra* notes 241-85 and accompanying text.

¹⁴⁸ The exception is known by different names. The term "artificial entity" is frequently used and is especially appropriate to describe the scope of the exception developed in *Hale v. Henkel*, 201 U.S. 43 (1906), and *Wilson v. United States*, 221 U.S. 361 (1911), which excluded corporations from the privilege in part because they are artificial creations of the state and do not enjoy the full rights of natural persons. In *United States v. White*, 322 U.S. 694, 701 (1944), the concept was expanded to "organized, institutional activity," apparently because the labor union involved in that case was unincorporated and therefore not an artificial creation of the state at all. In *Bellis v. United States*, 417 U.S. 85, 88 (1974), the Court used another broad term, "collective entity," perhaps because the partnership there also lacked the official legal status of a corporation. The terms "collective entity" and "artificial entity" will be used interchangeably throughout this article.

not refuse to provide an entity document even if production would be personally incriminating. The analysis in this section will focus primarily on the second part of the exception, where the operation of the fifth amendment remains an open and important issue.¹⁴⁹

The artificial entities exception to the fifth amendment has been supported at various points during its evolution by five distinct rationales: (1) the custodian's lack of property rights in records of the corporation; (2) the government's powers of inspection, known as "visitorial rights," that are implicitly reserved when it creates the artificial business unit; (3) the absence of personal privacy in such records; (4) the custodian's waiver of his personal privilege when he assumes his position in the organization; and (5) the practical need to enforce laws effectively against powerful economic institutions. Examination of the history of the exception reveals that as our understanding of the fifth amendment has changed, all but the last two of these supporting rationales have disintegrated altogether. This part argues that the remaining justifications are no longer adequate to support the weight of the exception, a doctrine that impinges considerably on personal fifth amendment rights.

¹⁴⁹ Although the exception is often viewed as a single rule, it is critical to separate its two elements in order to gain a clear understanding of its operation. When one considers only the issue of whether the fifth amendment should apply to artificial entities created by the state, the question is certainly an intriguing one. Indeed, because the Court has extended the warrant requirement of the fourth amendment to corporations, see *Hale v. Henkel*, 201 U.S. 43, 76-77 (1906), it is far from clear why corporations should not be granted fifth amendment rights as well. See Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 702 (1951); Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. Chi. L. Rev. 6, 36-38 (1986); Note, *supra* note 57, at 956. The Court's determination of this question, however, is virtually unrestricted by the history and policies behind the fifth amendment. See Saltzburg, *supra*, at 42-43. Indeed, because neither history nor policy supports extending the privilege to corporations, the Court is entirely justified in declining to do so based simply upon non-constitutional policy concerns.

On the other hand, when the two elements of the artificial entities exception are considered together, its validity is much more problematical. If the denial of the privilege against self-incrimination to corporations is interpreted to mean also that the real persons who work within it lose their personal privilege, then the supporting structure and theory of the fifth amendment are directly implicated. It is in this area that this article will concentrate, and it is here that it contends the exception is constitutionally invalid.

A. *Doctrinal Development*

The law of documentary subpoenas has its origins in *Boyd v. United States*,¹⁵⁰ which, though antedating the artificial entities exception, continues to cloud understanding in this area because of its references to privacy. The case involved a forfeiture action against the Boyd partnership for fraudulently attempting to import glass without the payment of customs duties. The prosecution secured a court order requiring the partnership to produce an invoice of a previous shipment.¹⁵¹ The Supreme Court held that the order was unconstitutional under the fifth amendment, because "we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."¹⁵²

Although *Boyd* is now considered the bulwark of privacy, the key feature of its contemporary analysis was the protection of personal property. When the Court in *Boyd* used the term "private books and papers," it was not speaking of privacy in a modern constitutional sense, nor even of confidentiality. The papers in issue related to business rather than to private or personal matters; they had not been prepared by the partners themselves but by third parties, the shippers of the glass; and customs law required that this sort of documentation be disclosed in other instances.¹⁵³ Al-

¹⁵⁰ 116 U.S. 616 (1886).

¹⁵¹ Id. at 618-19. For further amplification of the facts of *Boyd*, see *Shapiro v. United States*, 335 U.S. 1, 68 n.19 (1948) (Frankfurter, J., dissenting); *Hale v. Henkel*, 201 U.S. 43, 71 (1906).

¹⁵² *Boyd*, 116 U.S. at 633. The bulk of the opinion concerned the fourth, rather than the fifth, amendment. The Court held that even if authorized by court order, compulsory production of "a man's private papers, to be used in evidence against him" constituted an "unreasonable search and seizure" within the meaning of the fourth amendment. Id. at 622. With respect to the compelled production of "private books and papers" and their use in a criminal prosecution, the Court stated that the two amendments share an "intimate relation," id. at 633, and "run almost into each other," id. at 630.

While the Court's fourth amendment analysis has not stood the test of time, it may have accurately reflected the intention of the amendment's framers. See Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 912-15 (1985); see also *Boyd*, 116 U.S. at 630 (asserting that framers of fifth amendment relied, like the *Boyd* Court, on the language of Lord Camden in *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)).

¹⁵³ According to a 1789 law, the importer was required to "make an official entry with the collector at the port of arrival and there produce the original invoice to the collector." *Shapiro v. United States*, 335 U.S. 1, 68 n.19 (1948) (Frankfurter, J., dissenting).

though the Court noted the sensitive nature of the papers,¹⁵⁴ "private books and papers" meant principally property to which the public had no entitlement.¹⁵⁵ The Court's ruling was founded not on privacy but on general concepts of private property central to an age that considered the protection of property a cornerstone of the maintenance of individual liberty.¹⁵⁶ Thus while privacy interests were provided substantial protection under *Boyd*, this protection was merely a by-product of wider fifth amendment protection of private property generally.¹⁵⁷

Some two decades later in *Hale v. Henkel*,¹⁵⁸ the Court began to develop the artificial entities exception itself and articulated the

The *Boyd* opinion makes no reference to this law, and indeed, the opinion ignores this entire aspect of the case. As Justice Frankfurter rather forcefully argued in *Shapiro*, the *Boyd* decision is inconsistent with the "required records" doctrine as subsequently developed by the Court. *Id.* at 68 & n.19 (Frankfurter, J., dissenting). But see Meltzer, *supra* note 149, at 709 n.107 (invoice was not typical required record in that it was necessary to clear goods for entry, but was not required under threat of penal sanction).

¹⁵⁴ *Boyd*, 116 U.S. at 627-28, 630. Subsequently, in *Gouled v. United States*, 255 U.S. 298 (1921), the Court stated explicitly that protection under the fourth amendment extended to personal property generally and that papers had "no special sanctity." *Id.* at 309.

¹⁵⁵ Most notably, private property was not subject to search under the fourth amendment or use against the witness in court under the fifth amendment. The Court identified classes of property where the general public's property interest or the rights of third parties permitted seizure. These included goods liable to duties; books required by law to be kept by those manufacturing and processing taxable goods; contraband ("counterfeit coin, lottery tickets, implements of gambling, &c."); stolen property, which the owner implicitly authorized the state to use in the prosecution; and goods seized on attachment or execution to which the creditor was entitled for satisfaction of his debt. *Boyd*, 116 U.S. at 623-24.

¹⁵⁶ See Note, *supra* note 57, at 948-51; see also *Boyd*, 116 U.S. at 627 ("The great end for which men entered into society was to secure their property.") (quoting *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)).

¹⁵⁷ To the modern student of the fifth amendment, several aspects of the Court's opinion are striking. First, the Court ignored the fact that the records were obtained from a partnership; the artificial entities exception had not yet been recognized. See *Bellis v. United States*, 417 U.S. 85, 95 n.2 (1974). Second, the Court focused entirely upon the nature of the items produced—principally their character as private property and secondarily their character as papers—not on the communicative aspect, if any, of their production.

¹⁵⁸ 201 U.S. 43 (1906). *Hale*, the secretary-treasurer of a corporation, was held in contempt by the lower court for refusing to provide corporate records to a grand jury investigating criminal violations of the Sherman Act. *Id.* at 46. Under the Act, he automatically received personal immunity covering any transaction about which he testified or supplied documentary evidence. *Id.* at 46, 66. Nevertheless, he refused to testify because his testimony might also incriminate the corporation.

The Court rejected this argument. Its first ground was that the fifth amendment right is personal and may not be asserted to protect a third party, whether the third party is a natural person or a corporation. *Id.* at 70-71. Because *Hale* had immunity and faced no personal incrimination, this rationale was fully sufficient to resolve the case.

major continuing justification for that exception: the practical needs of effective law enforcement require access to corporate documents. Upholding a grand jury demand for corporate records, the Court noted that obstructing government access to corporate records would cripple prosecution of corporate criminal activity in a large number of cases.¹⁵⁹ The prosecution was entitled to secure such documents for two related reasons. First, the corporation was a creature of state law, incorporated for the benefit of the public; its right to act as a corporation was conditioned on its obedience to the laws of its creation.¹⁶⁰ Second, the Court cited a "general visitorial power," reserved when the state creates an artificial business unit like a corporation, that authorizes it to compel production of the entity's records.¹⁶¹ In light of the state's visitorial rights, the Court held that the corporation could not refuse to provide the subpoenaed documents.¹⁶²

In *Wilson v. United States*,¹⁶³ the Court took the critical leap and applied the exception to deny the privilege to the corporate representative.¹⁶⁴ Once again, the Court focused on the practical consequences of allowing the privilege to block production: the state's visitorial powers, the decision noted, "would seriously be embarrassed, if not wholly defeated in [their] effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation."¹⁶⁵

In addition to reaffirming the doctrine of visitorial powers, *Wilson* added waiver and property rationales to the list of justifications supporting the artificial entities exception. The Court reasoned that when the witness assumed the position of corporate president, he did so with knowledge of the corporate duty to pro-

¹⁵⁹ Id. at 74. Given the Court's ruling that the witness could not assert his personal privilege to protect third parties, see *supra* note 158, the argument concerning the needs of law enforcement was actually superfluous.

¹⁶⁰ *Hale*, 201 U.S. at 74-75.

¹⁶¹ Id. at 75.

¹⁶² Id.

¹⁶³ 221 U.S. 361 (1911).

¹⁶⁴ Though the grand jury's subpoena was directed to the corporation, its investigation was directed at Wilson, the corporation's president, who had already been indicted. Id. at 385; see also id. at 387 (McKenna, J., dissenting). In *Hale*, by contrast, personal incrimination was not an issue, because Hale had received automatic immunity from prosecution upon providing the documents. See *supra* note 158.

¹⁶⁵ *Wilson*, 221 U.S. at 384-85.

duce documents upon government demand; he thereby "waived" his personal fifth amendment right to resist.¹⁶⁶ Moreover, such documents were not the "private papers"¹⁶⁷ of the custodian, but rather those of the entity itself, held by the custodian in a representative capacity.¹⁶⁸

In *United States v. White*,¹⁶⁹ the Court extended the exception from corporations to other economic institutions, and in the process jettisoned visitorial powers as a major supporting principle for the exception. In *White*, the president of an unincorporated labor union had invoked his personal privilege in response to a subpoena demanding union records. The labor union was unincorporated and had not received special benefits from the state, so the Court could not rely, as it had in *Wilson*, on the government's retained visitorial rights to justify either regulation of the association or denial of the custodian's personal rights in the documents.¹⁷⁰ Characterizing *Wilson's* reliance on visitorial powers as merely "a convenient vehicle for justification of governmental investigation of corporate books and records,"¹⁷¹ the Court advanced a more general basis for denying the privilege to custodians—the "public necessity" to enforce the laws against powerful economic organiza-

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 380 (emphasis omitted).

¹⁶⁸ *Id.* at 378, 380, 385-86. The Court here used the type of analysis employed in *Boyd*. See *id.* at 366 ("Wilson was not required by the subpoena . . . 'to be a witness against himself.' The subpoena called for a book which belonged to the United Wireless Telegraph Company . . .") (argument of the Solicitor General); see also *id.* at 387 (McKenna, J., dissenting) (majority denying privilege "on the ground that the books were not his property, but that of the corporation").

The Court's conclusion appears obvious given the contemporary view that the custodian had no property interest in the records. That view meant that there was not a true collision between effective law enforcement on the one hand and the individual interest in protection against self-incrimination on the other. The Court was able to say that "[n]o personal privilege to which [the representatives] are entitled requires [a right to refuse inspection of corporate records]. It would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy." *Id.* at 385.

Under this property analysis, the Court had no need to disconnect the exception's impact on the corporation from its impact on the representative. See *supra* note 149. The two elements meshed perfectly because no rights belonging to the representative were violated.

¹⁶⁹ 322 U.S. 694 (1944).

¹⁷⁰ The lower court held explicitly that the union was not subject to the state's visitorial powers and that the custodian's personal claim under the fifth amendment was valid. See *United States v. White*, 137 F.2d 24, 26 (3d Cir. 1943), *rev'd*, 322 U.S. 694 (1944).

¹⁷¹ *White*, 322 U.S. at 700.

tions.¹⁷² Thus denial of protection to the individual was based directly upon the need for effective law enforcement, which the Court contended would otherwise be impossible.¹⁷³

The Court also introduced a new justification for the exception—the absence of a personal privacy interest in entity documents:

Such [union] records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. They therefore embody no element of personal privacy and carry with them no claim of personal privilege.¹⁷⁴

This expanded exception now applied to all “organized, institutional activity.”¹⁷⁵

¹⁷² Id.

¹⁷³ Id. at 700-01.

¹⁷⁴ Id. at 699-700 (citations omitted). In addition to the arguments set out above, the Court again used waiver and property rationales. It employed the broad concept of waiver stated in *Wilson*, finding that the custodian assumes “the rights, duties and privileges of the artificial entity or association” and is “bound by its obligations,” and that he therefore has “no privilege against self-incrimination.” Id. at 699.

Citing *Boyd* and the proposition that the fifth amendment extends only to personal property, the Court held that the witness could not assert his personal privilege for documents held in a representative capacity: “[T]he papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity.” Id.

Although the Court used arguments based on property concepts, the general thrust of the opinion showed a clear shift away from substantial reliance on these arguments. This shift was part of a general trend. Beginning in the first half of the twentieth century, analysis based on property rights was increasingly questioned when applied to both the fourth and fifth amendments, and the modern privacy doctrine began to emerge.

Dissatisfaction with the direct linkage between property and constitutional rights first arose in fourth amendment litigation. Justice Brandeis’s famous dissent in *Olmstead v. United States*, where he argued that the fourth amendment should protect the “right to be let alone” and not the right of property, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), is often cited as signaling the end of the dominance of property-based rationales. See Note, *The Life and Times of Boyd v. United States* (1886-1976), 76 Mich. L. Rev. 184, 193-95 (1977); see also Heidt, *supra* note 5, at 450-51 (discontent with property rights surfaced early in the twentieth century in decisions to allow use of defendant’s non-communicative property against him); Note, *supra* note 57, at 960-64 (*Olmstead* reflected a break from the “formalistic” thought of *Boyd*).

¹⁷⁵ *White*, 322 U.S. at 701. Under this formulation, the issue became whether an “organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.” Id.

In *Curcio v. United States*,¹⁷⁶ the Court again altered the foundations supporting the exception, undercutting at least partially the argument that the custodian waives his personal privilege by assuming his duties. The Court held that the custodian could be required to produce institutional records even though production conveyed some testimonial information,¹⁷⁷ but he could not be compelled to testify orally about the whereabouts of records that he did not produce:

A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony.¹⁷⁸

The Court acknowledged that a property rationale would permit the government to compel the custodian to produce organizational records "because he does not own the records and has no legally cognizable interest in them."¹⁷⁹ Oral testimony, however, was different; the custodian did not waive his constitutional privilege as to oral testimony by assuming the duties of his office.¹⁸⁰ Such a requirement would "require[] him to disclose the contents of his own mind,"¹⁸¹ and the Court was not willing to extend a waiver argument that far.¹⁸²

One consequence of determining an entity to be "organized, institutional activity" is simple, straightforward, and necessary under *Hale* and *Boyd*. If the entity meets the definition, the fifth amendment does not apply to it, and any papers that belong to the organization receive no protection as personal papers under *Boyd*. If, on the other hand, the papers belong to an individual, they are automatically protected. The definition thus establishes an important dividing line that determines when an institution's records do not receive protection as the papers of its individual members. That consequence of the definition is easily understood. The more substantial issue is how the exception justifies denying the institutional representative the right to assert his personal privilege under the fifth amendment. See *infra* note 257.

¹⁷⁶ 354 U.S. 118 (1957).

¹⁷⁷ *Id.* at 125.

¹⁷⁸ *Id.* at 123-24.

¹⁷⁹ *Id.* at 128.

¹⁸⁰ *Id.* at 124.

¹⁸¹ *Id.* at 128.

¹⁸² Unfortunately, the opinion left unsettled the extent to which the Court rejected the waiver argument. Given its view that the custodian had no protectable interest in the records because they were not his personal property, waiver was not involved at all when only institutional records were demanded. The opinion might therefore be read as disap-

Privacy soon assumed a more prominent role in shaping the scope of the collective entities exception. In *Bellis v. United States*,¹⁸³ the Court applied the exception to records subpoenaed from a partner in a three-person law firm. The Court relied heavily, as it had in *White*, on the policy of aiding effective law enforcement,¹⁸⁴ but the decision's most significant contribution was its extensive discussion of the privacy rationale, which included an attempt to recast *Boyd* and *Wilson* in such terms¹⁸⁵ and to emphasize the privacy element of *White*.¹⁸⁶ From this privacy rationale,

proving entirely the concept of waiver, because the Court rejected it completely in the only situation where waiver was necessary to authorize production of the documents. The opinion might also be interpreted to mean that waiver is valid to the extent *necessary* for effective law enforcement. Requiring the custodian to provide oral testimony might be helpful to the government, see *id.* at 127-28, but it is not necessary to effective law enforcement.

¹⁸³ 417 U.S. 85 (1974). A privacy rationale first assumed a major role in the law of documentary subpoenas outside the artificial entities exception. In *Couch v. United States*, 409 U.S. 322 (1973), the Court held that a taxpayer had no fifth amendment interest in records that were in her accountant's possession. It relied upon the fact that she had no reasonable expectation of privacy in documents provided to her accountant, an independent contractor, knowing that their contents would be revealed as part of her income tax return at his discretion. See *id.* at 335-36; *infra* notes 343-78 and accompanying text.

¹⁸⁴ The Court explained:

In view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations.

Bellis, 417 U.S. at 90. Because the Court had approved use immunity just two years earlier in *Kastigar v. United States*, 406 U.S. 441 (1972), this argument was even less valid than when first made by Justice Murphy in *White*. See *infra* note 240 and accompanying text.

¹⁸⁵ See *Bellis*, 417 U.S. at 91-92 ("Protection of individual privacy was the major theme running through the Court's decision in *Boyd* . . . , and it was on this basis that the Court in *Wilson* distinguished the corporate records involved in that case from the private papers at issue in *Boyd*." (citations omitted)).

In *Couch v. United States*, 409 U.S. 322 (1973), the Court similarly attempted to recast the rationale of *Perlman v. United States*, 247 U.S. 7 (1918), into a privacy mold. See *Couch*, 409 U.S. at 332. *Perlman* made no mention of privacy, however, and rested then, as it should today, on the absence of personal compulsion when the items are obtained from a third party.

¹⁸⁶ The Court noted:

Mr. Justice Murphy recognized the significance of [the lack of privacy and confidentiality in organizational records] in *White*; he pointed out that organizational records "[u]sually, if not always, . . . are open to inspection by the members," that "this right may be enforced on appropriate occasions by available legal procedures," and that "[t]hey therefore embody no element of personal privacy."

Bellis, 417 U.S. at 92 (quoting *White*, 322 U.S. at 699-700).

Justice Marshall developed a full-blown justification for denial of fifth amendment protections to documents held by representatives of collective entities. Because access to such records is generally regulated by the state and made available to members of the organization,¹⁸⁷ the representative has no privacy interest in them.

The Court used the privacy rationale to define the scope of the organized activity to which the fifth amendment would not apply. The privilege is unavailable to groups that are "relatively well organized and structured, and . . . maintain a distinct set of organizational records, and recognize rights in [their] members of control and access to them."¹⁸⁸ On the other hand, the Court suggested that some partnerships might retain fifth amendment protections—in particular, "small family partnerships" and those with "some pre-existing relationship of confidentiality among the partners."¹⁸⁹

Much of what had come before became obsolete with the decision in *Fisher v. United States*,¹⁹⁰ where the Court not only set out a new system for evaluating documentary subpoenas,¹⁹¹ but also further thinned the doctrinal underpinnings of the artificial entity

¹⁸⁷ The custodian lacks "the control over their content and location and the right to keep them from the view of others which would be characteristic of a claim of privacy or confidentiality." *Id.* The opinion claimed to trace this rationale to the opinions of the Court in both *Wilson* and *White* and explained the "modern day relevance of the visitorial powers doctrine" through the privacy concept. *Id.*

¹⁸⁸ *Id.* at 92-93.

The Court articulated secondary tests to give operative effect to its privacy and law enforcement rationales. These tests make two issues critical: is the organization an artificial entity and are the records held in a representative capacity? They do not, however, properly distinguish between cases in accordance with the Court's two underlying rationales.

The rationales of effective law enforcement against powerful economic organizations and protection of privacy provide little if any reason to protect the business records of a mammoth sole proprietorship but not those of a tiny partnership. Nevertheless, that is the precise result reached under the secondary test set up by the Court to determine the limits of the artificial entities exception. Because a sole proprietorship has no legal existence apart from its owner, its records may not be held in a *representative* capacity and are therefore protected by the fifth amendment regardless of the proprietorship's size, power, or lack of privacy. See *In re Grand Jury Empanelled Mar. 19, 1980*, 690 F.2d 327, 330-31 (3d Cir. 1982), *aff'd in part and rev'd in part sub nom. United States v. Doe*, 465 U.S. 605 (1984); *In re Grand Jury Empanelled Feb. 14, 1978*, 597 F.2d 851, 859 (3d Cir. 1979); *infra* notes 239 & 342.

¹⁸⁹ *Bellis*, 417 U.S. at 101.

¹⁹⁰ 425 U.S. 391 (1976).

¹⁹¹ See *supra* notes 6-25 and accompanying text.

exception.¹⁹² The Court explicitly recognized that *Boyd's* private property rationale had not survived the death of the "mere evidence" rule because "the foundations for the rule have been washed away."¹⁹³ With even greater force, *Fisher* rejected the privacy rationale for the fifth amendment.¹⁹⁴

After *Fisher*, only the policy of supporting effective law enforcement against economically powerful organizations and the argument that a custodian waives his personal privilege by acting through an organized institutional structure remain as justifications for the artificial entities exception. The next two subsections will consider whether the exception is viable now that its foundations, like those of *Boyd*, have been largely washed away.

B. The Inadequacy of the Waiver Rationale

Under the waiver rationale, the custodian of an artificial entity waives or perhaps forfeits his personal fifth amendment rights upon assuming a position as a representative of the entity.¹⁹⁵ This

¹⁹² At the same time, the Court discussed the artificial entity exception with apparent approval. See *Fisher*, 425 U.S. at 411-12.

¹⁹³ *Id.* at 409. In *Couch v. United States*, 409 U.S. 322 (1973), the Court had rejected an attempt "[t]o tie the privilege against self-incrimination to a concept of ownership." *Id.* at 331. *Couch* held that the defendant's ownership of papers was insufficient to entitle her to fifth amendment protection when they were possessed by a third party. Although neither *Couch* nor *Fisher* decided that an absence of ownership had no effect on fifth amendment protection, the rejection of *Boyd's* property orientation seems complete. The overall thrust of *Fisher's* act-of-production analysis is absolutely antithetical to any argument that the privilege turns on ownership of the documents. But cf. *In re Kave*, 760 F.2d 343, 356-58 (1st Cir. 1985) (no requirement that witness create documents but ownership is relevant).

¹⁹⁴ The Court explained:

Within the limits imposed by the language of the Fifth Amendment, . . . the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.

Fisher, 425 U.S. at 399 (footnote omitted). The Court continued:

We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure of] private information."

Id. at 401 (quoting *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975)).

¹⁹⁵ Courts continue to use the waiver concept to justify the artificial entities exception. See, e.g., *In re Two Grand Jury Subpoenae Duces Tecum*, One Dated Jan. 28, 1985, the Other Undated, 769 F.2d 52, 59 (2d Cir. 1985) ("The appellant . . . chose the corporate form

argument is only marginally more substantial than the other arguments dismissed earlier by the Supreme Court, and it is no longer a tenable basis for denying the privilege to the custodian who may be personally incriminated by the production of entity records.

As discussed above,¹⁹⁶ the Court in *Curcio* stated that a waiver principle, though it might apply to the production of documents, could not justify compelling oral testimony by the custodian. In *Marchetti v. United States*,¹⁹⁷ the Court rejected a similar waiver argument in the context of the related required records doctrine. The defendant challenged his prosecution for failure to comply with federal wagering tax laws on the ground that the law's reporting requirements violated the fifth amendment. In earlier cases, the Court had upheld similar provisions even though the disclosures required could incriminate the gamblers to whom they applied, reasoning that the gamblers were not actually compelled to incriminate themselves because the statutes did not require them to gamble in the first place.¹⁹⁸ In *Marchetti*, however, the Court announced that this reasoning was "no longer persuasive":

The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. . . . [I]f such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. To give credence to such "waivers" without the most deliberate examination of the circum-

in order to gain its attendant benefits; he cannot now disregard this form in order to shield its business records from production."); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 537 (3d Cir. 1985) (en banc) (Garth, J., dissenting) (collective entity doctrine based on theory that custodian "waives his personal fifth amendment rights upon accepting the corporate office"); see also Note, Fifth Amendment Privilege and Compelled Production of Corporate Papers after *Fisher* and *Doe*, 54 Fordham L. Rev. 936, 949-59 (1986) (arguing that implied waiver rationale is valid and justified by need to regulate corporate activity); cf. *In re Grand Jury Subpoena Duces Tecum Served Upon Underhill*, 781 F.2d 64, 70 (6th Cir.) (waiver doctrine justifies required records doctrine), cert. denied, 107 S. Ct. 64 (1986).

¹⁹⁶ See *supra* text accompanying notes 176-82.

¹⁹⁷ 390 U.S. 39 (1968).

¹⁹⁸ See *Lewis v. United States*, 348 U.S. 419, 423 (1955); *United States v. Kahriger*, 345 U.S. 22 (1953).

stances surrounding them would ultimately license widespread erosion of the privilege through “ingeniously drawn legislation.”¹⁹⁹

It is now clear that a waiver of this sort cannot constitute an independent justification for denial of constitutional rights. Then-Judge Scalia curtly dismissed a similar waiver argument in a case where the defendant challenged the requirement that he undergo a mental examination by a government expert as a prerequisite to raising an insanity defense:

It seems to us at best a fiction to say that when the defendant introduces his expert’s testimony he “waives” his Fifth Amendment rights. What occurs is surely no waiver in the ordinary sense of a known and voluntary relinquishment, but rather merely the product of the court’s decree that the act entails the consequence—a decree that remains to be justified.²⁰⁰

In fact, the waiver argument is nothing more than a rhetorical device used to justify denying the privilege to individuals who hold positions of responsibility in collective entities on the basis of public necessity. Its underlying rationale is that the need to regulate and police the conduct of artificial entities demands that those in control forfeit their fifth amendment rights concerning all recorded conduct within the organization. The validity of the modern collective entity exception thus reduces to whether the goal of fostering effective law enforcement regarding powerful economic organizations is sufficient to sustain the abrogation of the personal fifth amendment rights of their representatives.

¹⁹⁹ *Marchetti*, 390 U.S. at 51-52 (citations omitted) (quoting Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 37 (1949)). Professor Saltzburg has recently argued that, while not by itself decisive, a prospective command that conduct be performed lawfully in accordance with a prescribed regulatory scheme may satisfy the fifth amendment, *Marchetti*’s pronouncement notwithstanding. See Saltzburg, *supra* note 149, at 26. His argument does not, however, support the validity of the artificial entities exception. When applied to production of documents under subpoena, the doctrine operates in an entirely backward-looking fashion to aid in the prosecution of individuals involved in an adversarial—not a regulatory—system. See *infra* note 222 and text accompanying note 239.

²⁰⁰ *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc). The Supreme Court has applied a similarly straightforward approach to plea bargaining. The plea bargain process was upheld not because the defendant freely waived his rights under coercive pressure from the state, but because “the imposition of these difficult choices [the threat of a stiffer sentence if a plea is not entered] was . . . an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 & n.18 (1973); see Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 Iowa L. Rev. 741 (1981).

C. *The Inadequacy of the Law Enforcement Rationale:
Comparison with the Required Records Exception*

The required records and artificial entities exceptions to the fifth amendment both originated in a period during which property rights were the dominant concern of the Supreme Court.²⁰¹ But while the collective entities doctrine has since lost much of its theoretical support, the required records exception has developed a coherent, if controversial, doctrinal justification. The inadequacy of the law enforcement justification for the artificial entities exception is most clearly demonstrated where it permits compelled production of documents that could not be obtained under the required records doctrine.

Application of the required records doctrine is determined by weighing the state's regulatory interest in the maintenance and production of the documents demanded against the witness' fifth amendment rights in them. When record-keeping requirements are found invalid, it is usually because the requirements are not themselves part of a precisely focused regulatory scheme. By contrast, the artificial entities doctrine, whose remaining justification is a similar governmental need for information to aid law enforcement, lacks both a precise focus and a sufficiently strong regulatory, as opposed to prosecutorial, purpose.

The modern treatment of the required records exception began with *Shapiro v. United States*.²⁰² There the defendant was required under the Emergency Price Control Act to keep records of commodity sales.²⁰³ In upholding production of those documents pursuant to government subpoena, the Court relied on the required records exception to the fifth amendment. It acknowledged:

²⁰¹ The required records doctrine has its origin in *Wilson*, which focused on the right of the government to compel a corporate custodian to produce records of the corporation. See *supra* notes 163-68 and accompanying text. The Court's opinion depended critically upon a property-rights principle that the records involved did not belong to the defendant; they were not his personal private property, but rather public records to which the government had a superior right. However, the Court did not make clear exactly why the government had a superior right to such records. In *Shapiro v. United States*, 335 U.S. 1 (1948), Justice Frankfurter in dissent argued that "public records" in *Wilson* covered only records effectively belonging to the government because they were kept by public officials in the course of their official duties. *Id.* at 58-65 (Frankfurter, J., dissenting). But see Meltzer, *supra* note 149, at 709-12 (precedents cited by Court in *Wilson* do not fit Frankfurter's interpretation).

²⁰² 335 U.S. 1 (1948).

²⁰³ See *id.* at 4-5.

[T]here are limits which the Government cannot constitutionally exceed in requiring the keeping of records But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned and can constitutionally require the keeping of particular records, subject to inspection by the Administrator.²⁰⁴

Because Congress could constitutionally regulate commodity prices during a war emergency, the record-keeping requirement in *Shapiro* was upheld as a legitimate exercise of governmental power.²⁰⁵ The decision, however, set out no real standard for determining the validity of a particular record-keeping requirement, articulating only one criterion—that the government have a legitimate right to regulate the area involved.

In *Marchetti v. United States*²⁰⁶ and *Grosso v. United States*,²⁰⁷ the Court described the required records exception in greater detail in striking down wagering tax provisions as applied to professional gamblers. The Court set out three elements of the exception:

[F]irst, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed "public aspects" which render them at least analogous to public documents.²⁰⁸

Under the first element, the *Marchetti* Court noted that in *Shapiro* the requirements "were imposed in 'an essentially non-criminal and regulatory area of inquiry' while those [here] were directed to a 'selective group inherently suspect of criminal activities.'"²⁰⁹ Second, the defendants in *Marchetti* were not compelled merely to keep and preserve records that they would normally keep, but instead to supply information unrelated to any records they might

²⁰⁴ Id. at 32.

²⁰⁵ Id.

²⁰⁶ 390 U.S. 39 (1968).

²⁰⁷ 390 U.S. 62 (1968). An accompanying decision, *Haynes v. United States*, 390 U.S. 85 (1968), held that registration requirements for certain firearms were also invalid.

²⁰⁸ *Grosso*, 390 U.S. at 67-68.

²⁰⁹ *Marchetti*, 390 U.S. at 57 (quoting *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965)).

have maintained, a requirement that the Court viewed as "not significantly different from a demand that [they] provide oral testimony."²¹⁰ As to the third criterion, the Court stated only that the government's mere desire to have the information, even if expressed in statutory form, did not mean the records had public aspects.²¹¹

The three elements set out in *Marchetti* and *Grosso*, though they helped to sketch the rough contours of the required records exception, have proved largely without content and inadequate to provide the exception with clear boundaries. The second element—that the records be of a type customarily kept—has turned out not to be a requirement at all. If the records are of a type customarily kept, the record-keeping requirement is generally upheld,²¹² but failure to meet this test does not mean that a record-keeping statute is invalid.²¹³ The third element—that the records have public aspects—has proved to be nothing more than a restatement in different form of the first requirement. If the regulatory scheme itself is legitimate, rather than an indirect effort to unearth criminality, then the records are typically found to have public aspects, even though they are not public in any independent sense.²¹⁴

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See, e.g., *In re Grand Jury Subpoena Duces Tecum Served Upon Underhill*, 781 F.2d 64, 67-69 (6th Cir.) (automobile dealer's odometer readings), cert. denied, 107 S. Ct. 64 (1986); *In re Kenny*, 715 F.2d 51, 53 (2d Cir. 1983) (patient records and x-rays); *In re Doe*, 711 F.2d 1187, 1191-92 (2d Cir. 1983) (prescription records and patient files); *In re Grand Jury Subpoena to Custodian of Records, Mid-City Realty Co.*, 497 F.2d 218, 220-21 (6th Cir.) (real estate escrow deposit records), cert. denied sub nom. *Ficorelli v. United States*, 419 U.S. 1009 (1974); *In re Morris Thrift Pharmacy*, 397 So. 2d 1301, 1304 (La. 1981) (prescription records under Medicare regulations).

²¹³ See *infra* note 227.

²¹⁴ One commentator has suggested that the public aspects element of the doctrine means that "the records are known to some members of the public." Henkin, *The Supreme Court*, 1967 Term—Foreword: On Drawing Lines, 82 Harv. L. Rev. 63, 201 (1968). In some cases, the records are so accessible that they approach that definition and therefore easily qualify as required records. See *In re Two Grand Jury Subpoenae Duces Tecum Dated Aug. 21, 1985*, 793 F.2d 69, 73 (2d Cir. 1986) (contingent fee and retainer agreements required to be filed with court under its rules and typically kept by attorneys meet required records test); *In re Grand Jury Subpoena Duces Tecum Served Upon Underhill*, 781 F.2d 64, 68-69 (6th Cir.) (odometer reading statement must be provided to every automobile buyer and must be maintained for inspection by federal officials), cert. denied, 107 S. Ct. 64 (1986); *In re Doe*, 711 F.2d 1187, 1194 (2d Cir. 1983) (Friendly, J., concurring in part and dissenting in part) (prescription records, which must be filed with government agency, are "not simply required

The Court's decision in *California v. Byers*²¹⁵ significantly expanded the scope of the required records doctrine. In *Byers*, the Court approved a record-keeping requirement that challenged the values behind the fifth amendment far more directly than that in *Shapiro*. California required drivers who were involved in traffic accidents to stop and provide their names and addresses.²¹⁶ This fact situation differed from that in *Marchetti* and *Grosso* in one major way: the record the defendant was required to create—a record of his name and address—would not have been made in the absence of the regulatory scheme. Indeed, the defendant was being prosecuted for his failure to record the information at all. Furthermore, in *Byers*, the chance of incrimination resulting from disclosure of identity was not insignificant, regardless of the Court's

records but public records"). However, the public aspects requirement has tended to mandate no more than that the records are "required to be kept pursuant to a reasonable regulatory scheme." *United States v. Silverman*, 449 F.2d 1341, 1345 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1972); see *In re Kenny*, 715 F.2d 51, 53 (2d Cir. 1983); *Donovan v. Mehlenbacher*, 652 F.2d 228, 231 (2d Cir. 1981); *In re Grand Jury Subpoena to Custodian of Records, Mid-City Realty Co.*, 497 F.2d 218, 220-21 (6th Cir.) ("public aspects" means only "sufficient public concern," not availability to general public), cert. denied sub nom. *Ficorelli v. United States*, 419 U.S. 1009 (1974); *In re Doe*, 97 F.R.D. 640, 642-43 (S.D.N.Y. 1982), aff'd on other grounds, 711 F.2d 1187 (2d Cir. 1983); *United States v. LaPage*, 441 F. Supp. 824, 827 (N.D.N.Y. 1977). Indeed, the required records exception has been upheld in situations involving medical files of individual patients, which are not public in any general sense, although they must be kept for professional disciplinary purposes. See *In re Doe*; *In re Kenny*.

In *In re Doe*, Judge Friendly argued that there must be a "significant correlation between the purpose of requiring the records and that for which their production is sought," because of *Shapiro*'s requirement of a sufficient relationship between record-keeping rules and public concern animating its regulation. 711 F.2d at 1197-98. He contended that because patient files were required only for licensing purposes they were not subject to subpoena in a narcotics investigation because "Congress has made no determination that enforcement of the narcotics laws requires doctors to maintain patients' files and produce them before grand juries. . . ." *Id.* at 1198.

Judge Friendly's argument is not well taken. Although record-keeping must be mandated under a valid regulatory system to which it is rationally and reasonably related, the records need not have been created for the purpose of the investigation. See Saltzburg, *supra* note 149, at 30-31. Indeed, if Judge Friendly's logic were followed to its extreme, the requisite intimate relationship between investigatory purpose and record-keeping rules would conflict with the goal of neutrality of the regulatory scheme with regard to prosecution of crime. A system that requires the records to be for a purpose wholly separate from criminal prosecution would in fact present a stronger case for the application of the required records doctrine. See *LaPage*, 441 F. Supp. at 826-27 (records required by state to help control disease in cattle proper because not "aimed primarily at exposing crime").

²¹⁵ 402 U.S. 424 (1971).

²¹⁶ *Id.* at 425.

efforts to so characterize it.²¹⁷ *Byers* thus presents a different species of case than either *Shapiro* or the situation that *Grosso* suggested would satisfy the required records exception.²¹⁸

The *Byers* case produced no majority opinion. Both the plurality opinion, written by Chief Justice Burger for four justices, and Justice Harlan's concurring opinion did, however, use a common language. Both opinions recognized the need to balance the public's need for information against the defendant's fifth amendment interest in not reporting,²¹⁹ and each identified the threat of incrimination in disclosure as a critical variable. While the plurality appeared to use typical fifth amendment analysis regarding the requisite degree of incrimination,²²⁰ Justice Harlan acknowledged forthrightly that if accepted standards were used, the threat of incrimination would be sufficient to implicate the fifth amendment.²²¹ His opinion suggested, though, that in circumstances where the state has legitimate regulatory interests in addition to those involved in the investigation and prosecution of crime,²²² a

²¹⁷ See *infra* notes 220-21 and accompanying text.

²¹⁸ Indeed, one can get a rough idea of the complexity of a lower court case by noting on which Supreme Court cases it relies. If *Grosso* is used to uphold the scheme, the decision was most likely an easy one, see *supra* note 214, whereas if the court has to employ *Byers*, the issues were probably substantial and the threat to fifth amendment interests very real. See *infra* note 227.

²¹⁹ See *Byers*, 402 U.S. at 427 (Burger, C.J.) (plurality opinion); *id.* at 454 (Harlan, J., concurring).

²²⁰ At points, the plurality suggested that it too was adopting a different incrimination standard. See *id.* at 428 (Burger, C.J.) (plurality opinion) ("[U]nder our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here."). Elsewhere the plurality seemed to claim that it was applying the traditional standard and that under it the risk of incrimination was insubstantial. See *id.* at 431 ("[D]isclosures with respect to automobile accidents simply do not entail . . . [a] substantial risk of self-incrimination. . . ."). The plurality's position, however, is untenable: it cannot credibly be argued that in *Byers* the risk of incrimination failed to meet traditional fifth amendment standards. See Saltzburg, *supra* note 149, at 34-35 & n.147.

²²¹ See *Byers*, 402 U.S. at 437-39 (Harlan, J., concurring) (relying on *Hoffman v. United States*, 341 U.S. 479 (1951)).

²²² He explained:

[T]he primary context from which the privilege emerges is that of the criminal process, both in the investigatory and trial phases. When applied in that context, the sole governmental interest that the privilege defeats is the enforcement of law through criminal sanctions. And, with regard to the witness' privilege, the judge can, for the most part, draw the line between "real" and "imaginary" risks of incrimination in the marginal cases, thereby offsetting the tendency for the privilege to become an absolute right not to disclose any information at all.

different test should be applied.²²³ Harlan proposed a balancing of the “assertedly non-criminal governmental purpose in securing information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures required.”²²⁴ He concluded that given the strong governmental interest involved in the *Byers* case,²²⁵ the limited disclosures demanded were not sufficiently incriminating to violate the fifth amendment.²²⁶

Under Justice Harlan’s analysis in *Byers*, the required records test is transformed; only the first of *Grosso*’s three factors—whether the reporting scheme is essentially regulatory in purpose—has direct relevance. Lower courts have since broken this requirement into several additional elements. First, are there legitimate non-criminal regulatory purposes for the records system? Second, does the reporting requirement concentrate on a highly select and suspect segment of the general public? Third, does it require information relevant to the legitimate needs of regulation, or does it concentrate on information that is most explicitly useful in convicting the individual of crime? All three of these questions have been treated as more specific ways of asking whether a particular reporting requirement is designed to facilitate the government’s legitimate needs for regulatory information or simply to undercut the adversary system by covertly aiding the investigation and prosecution of crime.²²⁷

Id. at 440; see also *United States v. Parente*, 449 F. Supp. 905, 909 (D. Conn. 1978) (drawing a distinction between self-incrimination claims by person questioned under compulsory process and statutory requirement to furnish information for purpose outside adversary system); *United States v. Lubus*, 370 F. Supp. 695, 697 (D. Conn. 1974) (same).

²²³ *Byers*, 402 U.S. at 439, 454, 458 (Harlan, J., concurring). Accordingly, the standard for incrimination applied in required records cases should not be carried over to demands for information for exclusively adversarial use. Professor Heidt’s suggestion that a separate, more demanding fifth amendment standard be applied to the production of documents, see Heidt, *supra* note 5, at 483-84, is entirely inappropriate. Professor Saltzburg finds this “a particularly bad idea,” arguing that oral testimony and the act of production should be judged under similar fifth amendment standards. See Saltzburg, *supra* note 149, at 41 n.179.

²²⁴ *Byers*, 402 U.S. at 454 (Harlan, J., concurring).

²²⁵ The state’s interest was in “a system of personal financial responsibility for automobile accidents.” *Id.* at 440.

²²⁶ Justice Harlan viewed the disclosures as limited in nature because the defendant provided only his name and address, leaving the state with the burden of establishing his guilt of any criminal violation. *Id.* at 457-58. Although he acknowledged that identification could prove important information to the state, he considered the state’s requirement the minimum possible to satisfy its essential interests. *Id.* at 458 n.10.

²²⁷ The lower federal courts have relied on various articulations of the *Byers* balancing

Professor Saltzburg has recently amplified the elements of the

test in considering cases in which records would not have been produced in the normal course of the defendant's activities absent regulatory commands. At bottom, the critical issue in each has been whether the regulatory scheme was legitimate and substantial and had some purpose distinct from the prosecution of crime.

Several courts have examined the constitutionality of provisions of the Bank Secrecy Act that require disclosure of amounts in excess of \$5,000 transported across United States borders. See 31 U.S.C. § 5316 (1982). In *United States v. San Juan*, 405 F. Supp. 686 (D. Vt. 1975), rev'd on other grounds, 545 F.2d 314 (2d Cir. 1976), the court recognized that this statute satisfied none of the three *Grosso* criteria. The records would not have been ordinarily kept nor had they assumed public aspects; far from "purely regulatory in nature," the law had "a stated purpose of facilitating convictions." *Id.* at 693. Nevertheless, the court upheld the statute by weighing the "'public need on the one hand, and the individual claim to constitutional protections on the other.'" *Id.* at 694 (quoting *Byers*, 402 U.S. at 427). The government has a clear and continuing interest in controlling international transactions. See *id.* Compliance by itself is not directly incriminating; disclosure may lead to inquiry, but conviction requires additional evidence. See *id.* at 695. The court also noted that the regulations are relatively neutral on their face, apply to all international travelers, and do not require admission of criminal activity itself. *Id.* at 692; see also *United States v. Des Jardins*, 747 F.2d 499 (9th Cir. 1984) (holding that reporting requirement did not create a substantial hazard of self-incrimination), vacated in part on other grounds, 772 F.2d 578 (9th Cir. 1985); *United States v. Dichne*, 612 F.2d 632 (2d Cir. 1979) (same), cert. denied, 445 U.S. 928 (1980).

Courts of appeal have applied similar analysis to the provision in the Federal Gun Control Act requiring that unlicensed individuals provide written notice before shipping firearms on airlines. See 18 U.S.C. § 922(e) (1982). In *United States v. Flores*, 753 F.2d 1499 (9th Cir. 1985) (en banc), while noting that the defendant risked indirect incrimination by providing the required notice, the court concluded that the *Byers* balancing test supported its constitutionality: "[T]he important regulatory purpose of the Act, the neutral purpose of [the required notice] section . . . , and the fact that the notice requirement is directed to the public at large, bring the balance down decisively in favor of the statute." *Id.* at 1502. The same provision was upheld in *United States v. Alkhafaji*, 754 F.2d 641 (6th Cir. 1985). The *Alkhafaji* court stressed the provision's regulatory purpose—"to assist common carriers in their duty not to transport weapons and ammunition under conditions which violate other laws"—and the fact that it was directed at a group of people, many of whom would not be acting unlawfully, rather than at a highly selective and inherently suspect group. *Id.* at 647; see *United States v. Wilson*, 721 F.2d 967, 973-74 (4th Cir. 1983).

By contrast, in *Bionic Auto Parts & Sales, Inc. v. Fahner*, 721 F.2d 1072 (7th Cir. 1983), the court ruled that record-keeping requirements are invalid in the absence of a substantial non-criminal purpose. Striking down regulations that automobile parts dealers record and report altered serial numbers, the court identified two critical factors in assessing the constitutionality of reporting requirements: "the degree to which the information requested in and of itself is incriminatory and the degree to which those required to keep the records are suspected of criminal activity." *Id.* at 1082. Applying the *Grosso* factors, the court found no statutory purpose independent of a desire "to ferret out criminal activities." *Id.* at 1082-83. Significantly, the statute at issue imposed absolute criminal liability for possession or sale of parts with altered serial numbers. *Id.* at 1081. Reporting such possessions would, therefore, have amounted to direct self-incrimination.

required records doctrine; he identifies five.²²⁸ The first three again give specific substance to the general requirement that the government have a legitimate interest in regulating the activity, apart from the general desire to ferret out crime. First, the government must have general regulatory authority over the area. Second, the records required must be rationally related to the purpose of the regulation. Third, the government must both specify substantive rules to govern the activity and regulate the records to be kept.²²⁹

Saltzburg's two final elements provide protection against the limiting case where the government's rules satisfy the first three requirements in form but are in fact designed only to discover

²²⁸ See Saltzburg, *supra* note 149, at 24-25.

²²⁹ Personal tax information appears not to meet the required records exception because the government does not substantively regulate the activity in addition to requiring that information be provided. On the one hand, tax return questions would seem well within the definition of required records. Indeed, the Court had held up tax questions, which are "neutral on their face and directed at the public at large," as exemplifying required records in stark contrast with registration requirements for members of the Communist Party, which are "directed at a highly selective group inherently suspect of criminal activities." *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

Nevertheless, in *Garner v. United States*, 424 U.S. 648, 661-63 (1976), the Court held that a defendant may claim a fifth amendment privilege with respect to specific questions on the return that would incriminate him, at least as to crimes other than tax law violations. *Id.* at 650 n.3; see *United States v. Carlson*, 617 F.2d 518, 520 (9th Cir.), cert. denied, 449 U.S. 1010 (1980); *United States v. Neff*, 615 F.2d 1235, 1238-39 & n.3 (9th Cir.) (suggesting fifth amendment claim may be made to tax questions even as to information essential to tax liability), cert. denied, 447 U.S. 925 (1980). If the required records doctrine applied fully to tax returns, no claim of privilege would be valid.

In *United States v. Porter*, 711 F.2d 1397, 1404-05 (7th Cir. 1983), the court held that check and deposit slips, which Treasury regulations require the taxpayer to keep as substantiation for his return, were not required records. The decision equated the public aspects requirement with the existence of a positive regulatory scheme, see *supra* note 214, but concentrated on the absence of a substantive scheme of regulation for the activity: "[T]he taxpayer is not, as in *Shapiro*, required to keep such records as an ongoing condition of operating his business under a comprehensive government regulatory scheme. The taxpayer-IRS relationship is, instead, a more limited one which creates an imperative for access to records only in rare cases." *Porter*, 711 F.2d at 1405; see Saltzburg, *supra* note 149, at 24; cf. *People v. Mileris*, 103 Ill. App. 3d 589, 592-94, 431 N.E.2d 1064, 1067-68 (1981) (regulation requiring single medical record to be made in conjunction with workmen's compensation case did not cover other records that the doctor might also keep with regard to treatment of patient); *City of Kansas City v. Carter*, 610 S.W.2d 104, 108 (Mo. Ct. App. 1980) (records supporting business tax assessments mandated under affirmative regulatory scheme qualify as required records). But see *United States v. Fox*, 554 F. Supp. 422, 425-26 (S.D.N.Y.) (suggesting that tax records fall within required records rationale, although noting government policy not to argue the exception in tax cases), rev'd on other grounds, 721 F.2d 32 (2d Cir. 1983).

criminal activities. His fourth requirement is that the regulated activity may be conducted legally if the rules set out in the regulation are followed—that is, the activity is not inherently criminal. Finally, he would require that the regulations not compel disclosure of illegal activity that occurred *before* the regulations became effective.²³⁰

The various descriptions of the elements of the required records doctrine, though different in detail, share a common focus—at the center of each is the determination whether the government's interest in regulating the activity involved and having the specific records kept is sufficient to outweigh the witness' fifth amendment rights in those documents. When a valid regulatory system exists, the government can require not only that the party create the records, but also that he surrender them pursuant to subpoena. Although *Fisher* and *Doe* arguably have raised questions as to the validity of other doctrines that ignore the independent incriminating potential of the act of production, there remains a general consensus that production of required records may be constitutionally compelled.²³¹ Some courts have justified this result on the basis of waiver principles,²³² but it is more appropriate to view this com-

²³⁰ As Saltzburg describes these rules, "[r]ecord-keeping and production are simply burdens of engaging in the activity. The required records criteria provide sufficient protection against the unbridled use of regulatory tools for prosecutorial ends." Saltzburg, *supra* note 149, at 26.

²³¹ See, e.g., *In re Two Grand Jury Subpoenae Duces Tecum Dated Aug. 21, 1985*, 793 F.2d 69, 73 (2d Cir. 1986) (required records exception not weakened by *Doe*, especially where records are filed publicly); *In re Grand Jury Subpoena Duces Tecum Served Upon Underhill*, 781 F.2d 64, 69-70 (6th Cir.) (act-of-production doctrine has no impact on required records exception), cert. denied, 107 S. Ct. 64 (1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 528 (3d Cir. 1985) (en banc) (while *Doe* alters artificial entities exception, it has no impact on required records doctrine); *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 & June 22, 1983*, 722 F.2d 981, 987 n.5 (2d Cir. 1983) (required records doctrine "implies an obligation to produce" records not similarly applicable to all corporate records); *In re Doe*, 711 F.2d 1187, 1194 (2d Cir. 1983) (Friendly, J., concurring in part and dissenting in part) (the required records "exception includes their production despite the fact that testimony is thereby compelled"); *In re Grand Jury Proceedings (McCoy)*, 601 F.2d 162, 171 (5th Cir. 1979) (valid requirement to keep records "necessarily implies an obligation to produce them"). But see *United States v. Edgerton*, 734 F.2d 913, 918 n.4 (2d Cir. 1984) ("Whether the required records exception, which was a response to the *Boyd* privacy rationale, is still viable after the shift away from the privacy rationale, remains to be decided.").

²³² See, e.g., *In re Grand Jury Subpoena Duces Tecum Served Upon Underhill*, 781 F.2d 64, 69-70 (6th Cir.), cert. denied, 107 S. Ct. 64 (1986); *In re Grand Jury Proceedings (McCoy)*, 601 F.2d 162, 171 (5th Cir. 1979); *In re Grand Jury Subpoenas Duces Tecum Dated*

pelled production, like the requirement that the records be kept initially, as justified directly by the state's interest in obtaining the information, which overrides the individual's fifth amendment interest. For that interest to satisfy the required records doctrine, it must be adequate to justify both creation and production of the documents, because both testimonial acts are necessary for the state to utilize the information.²³³

When compared with the detailed requirements necessary to justify the compelled creation and production of records under the required records doctrine, the artificial entities exception appears to lack a solid foundation. As noted above, the only rationale remaining to justify this sacrifice of an individual's self-incrimination interest is the need for effective regulation of corporations, partnerships, and unincorporated associations.²³⁴ That interest would be too vague and imprecise to justify the compelled creation or production of records under the required records exception.

The magnitude of the error in analysis is demonstrated most clearly by the fact that the artificial entities exception, which is not supported by a specific state regulatory interest, authorizes the state to obtain records that it could not reach under the required records doctrine. While it is rarely used for this purpose, the artificial entities doctrine could technically be used to support record-keeping requirements that would be invalid under the required

June 13, 1983 & June 22, 1983, 722 F.2d 981, 987 n.5 (2d Cir. 1983). In *June 13 & 22 Subpoenas*, the court also noted that because possession of the records could not have been illegal—by law such records had to be maintained—proof of possession through the act of production could not violate the fifth amendment. *Id.* at 987 n.5. Where the only significant testimonial component involved in the act of production is possession, that rationale is of obvious validity. Under the theory that the public aspect of required records renders any implicit testimony of little significance, the court in *Underhill* attempted to expand this approach to cover all testimonial aspects of the act of production. *Underhill*, 781 F.2d at 70.

²³³ Creation of records will generally be more intrusive of fifth amendment interests than production and accordingly, if the former is justified, the latter will follow a fortiori. Cf. *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 234 (2d Cir.) ("[W]e think that the greater includes the less, and that, since the production can be forced, it may be made effective by compelling the producer to declare that the documents are genuine."), cert. denied, 279 U.S. 863 (1929).

²³⁴ The impact of these rules on the individual custodian, rather than on the entity itself, should be the focus of the inquiry. Surely the criminality of the corporation or partnership is not of more importance to the prosecution than that of the individuals who operate it. Accordingly, the focus of the analysis should be on individuals and the appropriate scope of their fifth amendment rights rather than on the impropriety of permitting artificial entities to enjoy a fifth amendment privilege indirectly through the custodian's personal privilege.

records doctrine,²³⁵ because the artificial entity has no fifth amendment privilege whatsoever.²³⁶ In addition, the artificial entity exception can be used to require the organization to produce any record that has been voluntarily created.

Requiring an entity to maintain any type of record demanded by the state would certainly be invalid under the required records exception. But the more significant violation of fifth amendment rights would result from the required production of all records voluntarily created.²³⁷ Such a requirement would be highly suspect under required records analysis because it is entirely retrospective in application. The artificial entities exception authorizes production after adversarial proceedings have been instituted; its requirements serve not to aid ongoing affirmative regulation of legitimate authority, but exclusively to assist in the prosecution of crime.

²³⁵ See *Bionic Auto Parts & Sales, Inc. v. Fahner*, 721 F.2d 1072, 1083 (7th Cir. 1983) (record-keeping requirement invalid as to sole proprietors under required records doctrine but may be enforced as to partnerships and corporations).

Professor Saltzburg advances a similar argument, questioning the appropriateness of the artificial entities exception under modern fifth amendment analysis because it allows the government to obtain records and incriminate the individuals who make up those entities under circumstances where the regulatory justification would be inadequate under the required records doctrine. See Saltzburg, *supra* note 149, at 40-41.

²³⁶ Because of the extraordinary impact such use of the artificial entities doctrine would have on the rights of individuals, courts in this context might find regulations that compel the creation of records under the artificial entities doctrine invalid insofar as such a requirement would violate the fifth amendment rights of the individuals who must produce them. An artificial entity can only act through its agents. See *Bellis*, 417 U.S. at 90. Requiring a corporation to create the records obviously requires its employees to generate those records and therefore at least implicates their personal fifth amendment privilege. Furthermore, in *Curcio*, when the government sought to require a custodian to go beyond the incriminatory acts necessarily involved in production of the documents, the Court ruled that such additional testimony violated the individual's privilege against self-incrimination. *Curcio*, 354 U.S. at 123-24. A similar result could well follow if the artificial entities exception were used regularly to require the creation of records not justified by the required records doctrine.

²³⁷ It might be argued that because requiring production of preexisting records is significantly less intrusive than requiring the creation of such records, it should be valid even if justified by a less substantial governmental interest. The distinction is, however, less dramatic than would first appear. First, if *Grosso's* requirements are satisfied, the required records doctrine will concern only records that would have been kept even without regulation. In these circumstances, the most critical impact of the required records doctrine is the requirement of production and the ability to penalize non-production, not the right to require their creation, which by definition would have occurred absent regulation. Second, because the artificial entities exception covers records of all types created for any reason—a huge field of economic activity—the ability to require production of such records is almost as threatening in scope as the ability to require the creation of specified records.

Moreover, the artificial entities exception has a direct impact upon important personal fifth amendment interests, because it requires the custodian to engage in testimonial conduct—through production of documents—that may be used to incriminate him. This significant infringement upon fifth amendment interests is inadequately justified, for it is supported only by the state's general desire to prosecute criminal activity effectively, the very interest that the fifth amendment is designed to afford protection against.

To justify such a serious limitation of individual constitutional rights, the required records analysis would demand the most substantial state interest.²³⁸ Yet the artificial entities exception can claim only a broad and nebulous interest in regulating the entire range of activities conducted by powerful economic organizations.²³⁹ It has no exclusively regulatory, as opposed to prosecutorial, purpose. Nor can this denial of individual fifth amendment rights be justified by a necessity rationale. With the development of use immunity and other methods for obtaining organizational documents that do not require personal incrimination by the custodian, most documents can be obtained through alternative means at relatively little cost to legitimate prosecutorial interests.²⁴⁰ Thus elimination of the artificial entities exception

²³⁸ See *Byers*, 402 U.S. at 440 (Harlan, J., concurring).

As a general matter, when the only governmental interest involved is the effective prosecution of crime, then a fifth amendment claim is not defeated by virtue of its impact upon that interest. But cf. *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc) (privilege against self-incrimination may be denied when true necessity exists such that honoring it would entirely distort the adversarial process).

²³⁹ If regulation of powerful economic organizations justifies the exception, the artificial entities exception is poorly crafted to achieve that goal. Sole proprietorships, which can be important and powerful economic entities, are excluded from the exception, and records of such organizations enjoy fifth amendment protection. Cf. *United States v. Benny*, 786 F.2d 1410, 1414-16 (9th Cir. 1986) (sole proprietorship may constitute an "enterprise" under RICO statute as a recognized legal entity through which illegal activities may be carried out); *McCullough v. Suter*, 757 F.2d 142, 143-44 (7th Cir. 1985) (same); see *infra* notes 338-40 and accompanying text.

One might argue that sole proprietorships are generally smaller than corporations. While that may be true, the size of the corporation is considered entirely irrelevant to the artificial entity exception. Even a one-man corporation is an artificial entity for purposes of the fifth amendment. See *Bellis*, 417 U.S. at 100 ("It is well settled that no privilege can be claimed by the custodian of corporate records, *regardless of how small the corporation may be.*" (emphasis added)). The same is effectively the law for partnerships, see *infra* notes 320-38 and accompanying text.

²⁴⁰ See *infra* text accompanying notes 283-84. On the consequences of use immunity, see Note, *Criminal Procedure—Sole Shareholder's Privilege Against Self-Incrimination in Pro-*

would not seriously undermine any public interests.

D. Lower Court Efforts to Accommodate the Artificial Entity Rule to the Act-of-Production Analysis

As demonstrated above, the theories that support the artificial entity exception are at various levels inconsistent with the modern analysis of the fifth amendment's application to the production of documents. Although a number of courts have taken the position that the act-of-production doctrine articulated in *Fisher* and *Doe* does not affect the artificial entities rule,²⁴¹ four of the federal circuits now recognize that the exception must be altered to accommodate these decisions.²⁴² This section will analyze the efforts of

ducing Corporate Documents—*In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (en banc), 59 Temp. L.Q. 219, 233, 238 (1986) (without collective entity rule and before *Fisher*, contents of business document would have been protected; post-*Fisher*, major practical justification for exception has been eliminated); supra notes 125-47 and accompanying text. But see *In re Grand Jury Subpoena Duces Tecum (Ackerman)*, 795 F.2d 904 (11th Cir. 1986) (relying on law enforcement rationale to justify continued validity of artificial entities exception).

²⁴¹ See, e.g., *In re Grand Jury Subpoena Duces Tecum (Ackerman)*, 795 F.2d 904 (11th Cir. 1986); *In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 861-62 (8th Cir.), cert. granted sub nom. *See v. United States*, 107 S. Ct. 59 (1986), cert. dismissed, 55 U.S.L.W. 3514 (U.S. Jan. 15, 1987) (No. 85-1987); *In re Grand Jury Subpoena (Lincoln)*, 767 F.2d 1130, 1131 (5th Cir. 1985); *United States v. (Under Seal)*, 745 F.2d 834, 839 (4th Cir. 1984), cert. granted sub nom. *United States v. Doe*, 469 U.S. 1188, vacated as moot, 471 U.S. 1001 (1985); *United States v. Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 943-45 (10th Cir.), cert. denied, 469 U.S. 819 (1984); *In re Grand Jury Witness (Molina)*, 552 F.2d 898, 899-900 (9th Cir. 1977); *In re Grand Jury Subpoenas Served Feb. 27, 1984*, 599 F. Supp. 1006, 1011-13 (E.D. Wash. 1984); *SEC v. Kingsley*, 510 F. Supp. 561, 563 (D.D.C. 1981); *In re Agan*, 498 F. Supp. 493, 494-95 (N.D. Ga. 1980); *United States v. Holley*, 481 F. Supp. 61, 63 (S.D. Fla. 1979); *South Carolina Tax Comm'n v. Reeves*, 278 S.C. 658, 659-60, 300 S.E.2d 916, 916-17 (1983).

Several courts, most notably the United States Court of Appeals for the Ninth Circuit, seem to imply that production of business documents generally does not rise to the level of testimony within the meaning of the fifth amendment. See, e.g., *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir. 1977); *United States v. Fishman*, 726 F.2d 125, 127 (4th Cir. 1983).

²⁴² The United States Courts of Appeal for the Second, Third, Fourth, and Sixth Circuits have adopted this position. The approaches of the Second and Third Circuits are discussed in detail *infra* notes 243-85 and accompanying text. The Fourth Circuit has recently adopted the view of the Second Circuit, holding that, although production is typically not personally communicative for the institutional representative, on those "rare occasions" when it is sufficiently testimonial, "the individual has a personal fifth amendment privilege." *United States v. Lang*, 792 F.2d 1235, 1240-41 (4th Cir.), cert. denied, 107 S. Ct. 574 (1986). The Sixth Circuit has adopted a position somewhat similar to that of the Second Circuit. See *infra* note 272; see also *In re Grand Jury Subpoena (Shuler)*, 635 F. Supp. 569

two of these circuits to reconcile the act-of-production analysis with the artificial entities exception. The analysis will reveal that there are few areas of real conflict between the exception and the extension of the act-of-production privilege to institutional representatives. The analysis will also demonstrate that the artificial entities exception does not withstand careful scrutiny where it does in fact collide with the act-of-production privilege, given the relatively minor impediment to effective law enforcement that it creates.

The Second Circuit has provided the most extensive treatment of these issues. Recognizing, albeit grudgingly, that the analysis of *Fisher* and *Doe* is incompatible with the artificial entities exception, the Second Circuit has attempted to narrow the area of conflict between the two doctrines. In the process, it has both distorted the incrimination concept as applied to production by custodians and ignored entirely certain testimonial aspects of production. Although the court has been willing to admit that production violates the personal rights of custodians in only a limited area, it has assumed that the privilege overrides the artificial entities exception in that area. Rather than concentrating on resolving the conflict directly, the court's focus has been on developing a means of providing the government with access to records without denying the fifth amendment rights of individual custodians. This effort has been generally successful and largely consistent with the basic fifth amendment principles discussed in Part I. Nevertheless, the court has distorted the analysis when faced with special corporate structures where it is difficult to apply. Its chief error has been its failure to recognize that the two doctrines remain incompatible in some cases and that, in those situations of conflict, the artificial entities exception is invalid.

The Second Circuit has recognized that the act-of-production analysis applies in some circumstances to the collective entity exception. In *In re Katz (Jamil v. United States)*,²⁴³ a grand jury investigating the unlawful export of munitions subpoenaed from

(N.D. Ga. 1986) (combining approaches of Second, Third, Sixth, and Eighth Circuits); *State v. Wellington Precious Metals, Inc.*, 487 So. 2d 326 (Fla. Dist. Ct. App. 1986) (adopting Third Circuit approach).

²⁴³ 623 F.2d 122 (2d Cir. 1980). For the facts of *Katz*, see *supra* notes 87-91 and accompanying text.

the target's attorney "all public documents in his possession relating to any company owned, operated or controlled" by the target.²⁴⁴ The government suspected that the attorney might have custody of certificates of incorporation that did not on their face indicate the target's control, and that compliance with the subpoena would provide the link necessary to establish control.²⁴⁵ The Second Circuit held the fifth amendment applicable despite the fact that the documents were corporate records held apparently in a representative capacity.²⁴⁶ As the government was ignorant of the existence and location of some of the documents, the court reasoned, the witness' response to the subpoena would be testimonial; it was also highly incriminating.²⁴⁷

The Second Circuit subsequently limited the impact of the act-of-production analysis on the artificial entities exception by narrowly interpreting the situations in which production is incriminating. In *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 & June 22, 1983*,²⁴⁸ a former corporate president was ordered to produce all company records in his possession. The court recognized that because the officer was not authorized to have the documents, possession might incriminate him by helping to demonstrate his guilty knowledge of their contents.²⁴⁹ The court

²⁴⁴ Id. at 125.

²⁴⁵ Id. at 126.

²⁴⁶ This case is not easily squared with the theory of the artificial entities exception. The court in *Apache Corp. v. McKeen*, 529 F. Supp. 459 (W.D.N.Y. 1982), provided one possible solution, ruling that where the government has independent evidence to connect the target with a named corporation, the records may be subpoenaed from him. Id. at 463. It remains unclear, however, why the exception does not apply where the prosecution fails to establish a connection between the corporation and the individual. Responding to a subpoena would indeed communicate such a connection, but, as discussed above, the artificial entity exception frequently allows for the compulsion of incriminating communication.

In *In re Grand Jury Subpoenas Issued to Thirteen Corporations*, 775 F.2d 43 (2d Cir. 1985), cert. denied, 106 S. Ct. 1459 (1986), the court distinguished *Katz* on the basis that the subpoena there was issued directly to an individual rather than to the corporation. Id. at 46-47. The court emphasized that the corporation, which could not have asserted the privilege, was unable to substitute a representative whose response would not violate his personal privilege. See id. Even if valid, this does not explain how traditional application of the artificial entities doctrine would allow the named individual to claim his privilege. Cf. *In re Grand Jury Empanelled Mar. 8, 1983*, 722 F.2d 294, 296-97 (6th Cir. 1983) (suggesting that the artificial entities exception was inapplicable in *Katz* because some of the businesses may have been organized as sole proprietorships), cert. dismissed, 465 U.S. 1085 (1984).

²⁴⁷ *Katz*, 623 F.2d at 126.

²⁴⁸ 722 F.2d 981 (2d Cir. 1983).

²⁴⁹ Id. at 987.

distinguished this situation from the typical case where a current corporate representative is required to produce documents and such disclosure would not personally incriminate him:

[T]hat is because there would rarely be any dispute over possession when the person subpoenaed is required to respond in his representative capacity. In producing records as an officer of the company he would not be attesting to his personal possession of them but to their existence and possession by the corporation, which is not entitled to claim a Fifth Amendment privilege with respect to them.²⁵⁰

Under this analysis, corporate representatives are denied the privilege in the typical situation because the act of production is not deemed personally incriminating, so that the fifth amendment is inapplicable without resort to the artificial entities exception. This argument is generally acceptable with regard to the implied communication of possession,²⁵¹ but it will on occasion be erroneous with respect to the communication of authentication²⁵² and is

²⁵⁰ *Id.* at 986; see also *United States v. Holley*, 481 F. Supp. 61, 63 (S.D. Fla. 1979) (“[B]ecause the summons demands records of [the corporation] and is not addressed to the Respondent personally, the Respondent admits nothing by producing the documents, except that they are the records of the corporation.”).

²⁵¹ Responding to the subpoena proves the custodian’s possession of the documents at the time delivered, but establishes only that the collective entity had the documents and that the custodian was able to acquire them after the demand was made. As a result, it does not establish illegal possession by the representative or even infer his guilty knowledge of the contents at a relevant moment. See *Segmond v. United States*, 589 F. Supp. 568, 576 (S.D.N.Y. 1984) (“It is not [the custodian’s] possession of these documents that is potentially incriminating, rather it is the contents of these documents and the corporation’s possession of them that is potentially incriminating. . . . [His] possession of these documents is not even at issue in this case.”) (citations omitted); *supra* note 61. Given the generally limited significance of possession, see *supra* notes 80-81 and accompanying text, possession by the corporation in the typical case is not personally incriminating to the custodian. But see *supra* note 55.

²⁵² The custodian’s production effectively authenticates the documents as belonging to the collective entity; they can be introduced in court without further proof. See *Fisher*, 425 U.S. at 413 n.14. The act of production may, however, entail personally incriminating authentication testimony. See *In re Grand Jury Empanelled 3-23-83*, 773 F.2d 45 (3d Cir. 1985); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (*en banc*).

The decision in *In re Grand Jury Subpoena Duces Tecum Dated November 13, 1984*, 616 F. Supp. 1159 (E.D.N.Y. 1985), illustrates how authentication of business records can constitute testimonial incrimination. Ruling that because of the special intimate character of the partnership it would be treated in effect as a sole proprietorship, the court held that production of documents by the partner would be incriminating under the “implicit authentication” element because his testimony would connect the documents to the business for pur-

generally untenable with regard to the communication of existence. When the corporate representative acknowledges that documents exist of which the government is otherwise ignorant, the conduct is testimonial for him and may be just as derivatively incriminating as if the documents were his personally.²⁵³

The Second Circuit next turned its attention to the practical concerns of facilitating production of corporate documents from the organization itself, which has no privilege and therefore cannot directly avoid production. In *In re Two Grand Jury Subpoenae Duces Tecum*,²⁵⁴ the witness receiving the subpoena, who was the target of a grand jury investigation, was the majority stockholder, sole operating officer, and director of a three-person corporation.²⁵⁵

poses of the litigation. *Id.* at 1161-62. Whether a business is a sole proprietorship or a collective entity, the act of production has the same authenticating effect.

²⁵³ Cases in the Second Circuit subsequent to *June 13 & 22 Subpoenas* have read this case to mean that production of documents held in a representative capacity may violate the fifth amendment in spite of the artificial entities exception. Under this view, production of documents held in a representative capacity is not categorically excluded from the fifth amendment. Rather, the privilege is inapplicable because production of many documents held in a representative capacity has only limited testimonial relevancy to the custodian personally. See *In re Grand Jury Subpoenas Issued to Thirteen Corporations*, 775 F.2d 43, 46-47 (2d Cir. 1985), cert. denied, 106 S. Ct. 1459 (1986); *In re Two Grand Jury Subpoenas Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985).

Alternatively, *June 13 & 22 Subpoenas* could be read as having absolutely nothing to say about documents held in a representative capacity but to rest entirely upon the fact that the documents were held in an individual capacity. Under this view, the corporation's ownership or creation of the documents was irrelevant to the court's analysis; the defendant's possession was unauthorized and illegal and therefore his possession was personal. Indeed, the case seems to say as much:

For the purpose of determining the extent to which a natural person may invoke his Fifth Amendment privilege under *Fisher*, the fact that the subpoenaed documents in his possession were prepared by a corporation is not directly relevant. The *Fisher* doctrine simply does not turn on either content or authorship of the documents; it is the fact, and the circumstances, of possession that are controlling.

June 13 & 22 Subpoenas, 722 F.2d at 987.

So characterized, the corporate nature of these documents is irrelevant in the same way that the authorship and contents of documents held by an individual are not decisive in determining whether the act of production is testimonial. See *In re Doe*, 711 F.2d 1187, 1195-96 (2d Cir. 1983) (Friendly, J., concurring in part and dissenting in part). The critical inquiry is whether they are held by a person as a representative of the business or as an individual. See *In re Grand Jury Subpoena* (85-W-71-5), 784 F.2d 857, 861 (8th Cir.) (construing *June 13 & 22 Subpoenas* as involving records held in individual capacity), cert. granted sub nom. See *v. United States*, 107 S. Ct. 59 (1986), cert. dismissed, 55 U.S.L.W. 3514 (U.S. Jan. 15, 1987) (No. 85-1987).

²⁵⁴ 769 F.2d 52 (2d Cir. 1985).

²⁵⁵ *Id.* at 54.

The Second Circuit had no need to decide whether the witness' production of the documents would violate his personal privilege, because the district court had excused all grand jury targets from the operation of the subpoena and permitted the corporation to select another agent to provide the records.²⁵⁶ The decision emphasized, rather, the paramount duty of the corporation to provide the subpoenaed documents: "There simply is no situation in which the fifth amendment would prevent a corporation from producing corporate records, for the corporation itself has no fifth amendment privilege."²⁵⁷

²⁵⁶ Id. at 57. The court nevertheless acknowledged that in some situations personal testimonial incrimination would result from the custodian's production of corporate records. Id. at 55, 57.

In *United States v. Barth*, 745 F.2d 184 (2d Cir. 1984), cert. denied, 470 U.S. 1004 (1985), the circuit first established the district court's authority to order the corporation to provide an agent who would not be personally incriminated by producing the subpoenaed documents. Id. at 189-90. The defendant, the president of a corporation, was being investigated for failure to file personal and corporate tax returns. Asserting his personal privilege, he refused to testify about what corporate records existed and who was responsible for maintaining them. Although he did furnish a list of employees who had knowledge about the records, each claimed his personal privilege against self-incrimination when summoned to testify. Id. at 188.

This appears to be a typical situation in which the government does not know exactly what records exist but has an idea of the categories of documents it wants to inspect. If the artificial entities exception gives the corporate representatives no privilege to refuse production, then the refusal of Barth and the other employees should have been rejected outright. The court, however, was willing to uphold their personal self-incrimination claims, apparently on the grounds that the government had an alternative means of obtaining the documents. The decision approved the lower court's order directing the corporation to name a knowledgeable employee without a fifth amendment claim to produce the records. Because the corporation itself had no fifth amendment privilege, the Second Circuit concluded that the district court's order was valid. Id. at 188-89. But see *United States v. Hankins*, 565 F.2d 1344, 1350 (5th Cir. 1978) (order to corporate president to provide witness vacated because government may have ability to identify suitable witness and president could neither compel witness' attendance nor warrant that he would not claim privilege), cert. denied, 440 U.S. 909 (1979).

²⁵⁷ *Two Grand Jury Subpoenae*, 769 F.2d at 57. The court rejected the defendant's contention that Doe entirely changed the artificial entity rule. Contending that he should enjoy the same protections under the act-of-production doctrine as an individual operating a sole proprietorship, the witness argued that neither he nor the corporation could be ordered to produce documents because of his personal privilege and the fact that the corporation was so small that it was closely identified with him. Id. at 57-58.

The court's rejection of this reasoning was grounded in the Supreme Court's decision in *Bellis*, which distinguished organizations with a "recognizable, juridical existence apart from their members, such as corporations and partnerships, and those organizations which do not, such as the sole proprietorship." Id. at 59. When used for the limited purposes seen in this case, this reasoning is rational. The issue is whether there is an entity sufficiently sepa-

In *In re Grand Jury Subpoenas Issued to Thirteen Corporations*,²⁵⁸ the Second Circuit completed its reconciliation of the act-of-production and artificial entity doctrines by "fudging" the analysis and holding that incrimination was not compelled where, because of the corporation's small size, it had no knowledgeable representative without a personal privilege to produce the subpoenaed documents. The government subpoenaed from one "Roe" documents involving thirteen corporations.²⁵⁹ Although the basis of its decision was not entirely clear, the district court apparently concluded that because the government lacked adequate knowledge of the existence of the documents, Roe's production of them would provide significant testimonial information regarding both their authenticity and their existence.²⁶⁰

The Second Circuit first ruled that the government had shown a sufficient connection between Roe and the corporations to make him an appropriate agent to receive service.²⁶¹ Yet it ruled that Roe was not required to respond personally, because he was served only as a representative and the government was obligated to be satisfied with production by any corporate representative.²⁶² Thus, Roe's personal fifth amendment rights protected him from being compelled to produce the documents, but the corporation, which had no privilege, was obligated to produce them through some other agent.²⁶³

Roe argued, however, that there was no other agent with knowledge of the documents who would not be personally incriminated by producing them, as the corporations were small and closely held, and twelve of them had been dissolved.²⁶⁴ Even if a new representative were appointed, it would be necessary for Roe to inform that individual of relevant information that could be used to

rate from and independent of the individual that it can fairly be denied fifth amendment rights and directed to produce its own records. This use of the artificial entities concept requires less justification than that which forces anyone who acts for the organization to waive his or her personal privilege. See *supra* note 175.

²⁵⁸ 775 F.2d 43 (2d Cir. 1985), cert. denied, 106 S. Ct. 1459 (1986).

²⁵⁹ *Id.* at 44 & n.2.

²⁶⁰ *Id.* at 45.

²⁶¹ *Id.* at 46.

²⁶² *Id.*

²⁶³ *Id.* at 47.

²⁶⁴ *Id.* at 47-48.

incriminate Roe in the same manner as production.²⁶⁵ The Second Circuit expressed skepticism that another employee—the corporate secretary—could not accomplish the tasks.²⁶⁶ More significantly, it ruled that “any information obtained from Roe would not have been extracted under an order requiring him to testify.”²⁶⁷

Up to this final step, the Second Circuit’s focus on the duty of the corporation to provide documents was generally sound.²⁶⁸ It erred, however, in ruling that requiring a representative to disclose information to others is outside the scope of the fifth amendment. If Roe failed to provide the new agent with the necessary information, both the corporation and Roe, as its representative, would be subject to contempt. Thus, Roe himself was compelled to respond even though the order was directed to him as a representative, and the information he provided would be just as incriminating when conveyed through the new representative. The only difference would be that another person would articulate the information supplied by Roe. Under ordinary fifth amendment principles, the government’s use of the information would be prohibited as an improper derivative use; the intermediary role of another person would not attenuate the taint.²⁶⁹

In the last analysis, however, the most significant aspect of the

²⁶⁵ *Id.* at 48.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ As described above, the Second Circuit took the view that, in the typical situation, production by the corporate representative poses little threat of personal incrimination. But production in this case appeared to provide testimonially incriminating information, though the threat of incrimination was not as unmistakable as it was in *Katz* and *June 13 & 22 Subpoenas*.

On the other hand, either a subpoena whose coercive force is directed solely against the corporation or production by a newly appointed agent will avoid any violation of the custodian’s fifth amendment rights. See *In re Grand Jury Subpoenas Duces Tecum Served Upon 22nd Ave. Drugs, Inc.*, 633 F. Supp. 419, 424 (S.D. Fla. 1986) (if corporation cannot produce suitable representative, court may fine it for contempt on daily basis until documents are produced, or secure documents from secretary of state as agent of corporation). If neither method is effective, the prosecution could secure the documents only by granting immunity to the custodian personally.

²⁶⁹ Because the court compelled Roe to provide information to the new witness and to identify him as the person to receive the subpoena, any testimony by the new witness would involve exploitation of the primary illegality, see *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963), not the independent act of the witness unconnected to the constitutional violation, see *United States v. Ceccolini*, 435 U.S. 268, 279-80 (1978).

Second Circuit's approach is the way in which it narrows the necessary conflict between the act-of-production analysis and the artificial entities exception.²⁷⁰ Under its approach, a trial court can order an organization with a recognized juridical existence separate from its officers and employees to select a privilege-free custodian to produce the documents, ridding the government of that difficult task. The Second Circuit's practical focus on identifying an individual without a valid fifth amendment privilege, coupled with its recognition of the limited role played by the concept of the artificial entity, holds promise to narrow the difference in treatment between those organizations and sole proprietorships. Indeed, with the demise of the privacy rationale for the privilege, there is no reason why employees of large sole proprietorships who have access to and knowledge of organizational records, but are not themselves threatened with self-incrimination, should not be compelled to produce those records.²⁷¹ Though the government may have to identify or immunize the particular employees of the sole proprietorship because it has no legal existence separate from them, they could still be required to produce the organization's records.²⁷²

²⁷⁰ See Note, *supra* note 147 (accepting general validity of Second Circuit approach and arguing that its impact upon production of corporate documents would be both limited and consistent with post-*Fisher* view of fifth amendment).

²⁷¹ See *infra* note 342.

²⁷² In *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir.) (en banc), cert. denied, 106 S. Ct. 594 (1985), the Sixth Circuit adopted an approach somewhat akin to that of the Second Circuit, but differing from it in several important respects. The Sixth Circuit ruled that *Doe* did not change the collective entity rule, and that the act of production by a custodian is not personally testimonial because he "acts only in a representative capacity, not as an individual, and production . . . communicates nothing more than the fact that the one producing them is a representative of the corporation or partnership." *Id.* at 148. More significantly, it ruled that the artificial entities exception and the act-of-production analysis conflict only if the defendant's production of the documents is used *directly* against him. In reaching these conclusions, however, the court distorted standard fifth amendment analysis in several places.

First, the court used an especially strict definition of the testimonial requirement for the act of production: a testimonial communication occurs only when "the very act of production supplies a *necessary* link in the evidentiary chain"; the witness must demonstrate "that the act of production *alone* would involve an incriminating testimonial communication." *Id.* at 146 (emphasis added) (quoting *United States v. Schlansky*, 709 F.2d 1079, 1084 (6th Cir. 1983), cert. denied, 465 U.S. 1099 (1984)). Under this formulation, the privilege is violated only if the defense shows that the act of production provided unique information for which the government has no other sources.

Second, the court ignored the possibility that the admissions of authenticity and existence inherent in production would constitute personal testimony by the custodian. See *supra*

The United States Court of Appeals for the Third Circuit has taken a more radical approach. It holds that the act-of-production

note 252 and accompanying text. As the dissent argued, the act of production may result in critical incrimination particularly when the government is unable to establish independently the existence of the subpoenaed corporate documents. See *id.* at 149 (Jones, J., dissenting). The court's error originated in *In re Grand Jury Empanelled March 8, 1983*, 722 F.2d 294 (6th Cir. 1983), cert. dismissed, 465 U.S. 1085 (1984). There the Sixth Circuit had ruled that in judging whether production of corporate documents was testimonially incriminating to the custodian, the court should focus only on what was proved by the act of production "standing alone." *Id.* at 297. Alone, production proved only the custodian's possession of the documents—"necessarily in a representative capacity"—and his belief that they were those demanded by the subpoena; neither communication warranted fifth amendment protection in the court's view. *Id.* at 296-97.

Third, and most critically, the Sixth Circuit implicitly limited the privilege to direct testimonial use of the act of production: "[I]f the government later attempts to implicate the custodian on the basis of the act of production, evidence of that fact is subject to a motion to suppress. 'Such proof would seek to add testimonial value to the otherwise testimony-free act of production.'" *Morganstern*, 771 F.2d at 148 (quoting *March 8 Grand Jury*, 722 F.2d at 297 (quoting *Schlansky*, 709 F.2d at 1083)); see also *In re Grand Jury Subpoena* (85-W-71-5), 784 F.2d 857, 861 (8th Cir.) (adopting Sixth Circuit's approach), cert. granted sub nom. See *v. United States*, 107 S. Ct. 59 (1986), cert. dismissed, 55 U.S.L.W. 3514 (U.S. Jan. 15, 1987) (No. 85-1987).

The argument that only direct use of the act of production violates the fifth amendment originated in *Schlansky*. See *supra* note 104. There the subpoenaed records were described with extraordinary objective clarity. As a result, the defendant provided no communication of evidentiary significance as to authenticity by selecting the documents; he did only what an objective observer would do. See *supra* note 37 and accompanying text. As to existence, given the government's extensive knowledge concerning the documents, the issue was a foregone conclusion. Nevertheless, production *could* potentially be used against the witness. For instance, his possession of the objectively described notebook would have some authenticating value if the fact of production was used. As *Fisher* suggests, even if the documents may be demanded because production is not sufficiently testimonial, the government still violates the fifth amendment if it uses the act of production directly to prove its case. See *Fisher*, 425 U.S. at 411; see also *Estelle v. Smith*, 451 U.S. 454, 463-65 (1981) (defendant's psychiatric examination may constitute real evidence but fifth amendment violated if used for its testimonial content).

While *Schlansky's* treatment of the act of production was appropriate given its facts, the Sixth Circuit's analysis in *Morganstern* was misguided. By itself, a prohibition against direct use does not eliminate the testimonial self-incrimination potential of the act of production. Instead, it serves properly only as a secondary protection against misuse when the act of production is outside the fifth amendment under the foregone conclusion doctrine. Furthermore, the ruling gives the defendant the burden of proving derivative use, which is contrary to the holding of *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (prosecution has "affirmative duty to prove that [its] evidence is derived from a legitimate source wholly independent of the compelled testimony"). Finally, the court's analysis conflicts with the Supreme Court's holding in *Doe* that courts may not grant constructive immunity. See *Doe*, 465 U.S. at 616-17. Indeed, in *Doe* the government urged the Court to adopt *Schlansky's* approach to immunity, see Brief for the United States at 43-44, *Doe* (No. 82-786), but the Court refused to do so.

doctrine of *Fisher* and *Doe* provides the custodian with the right to resist production under the fifth amendment whenever the act of producing corporate records would personally incriminate him. In *In re Grand Jury Matter (Brown)*,²⁷³ a custodian of corporate records argued that he should not be required to produce them in response to a subpoena where his acts would authenticate the records²⁷⁴ and thereby incriminate him. The government, joining the constitutional issue directly, contended that if the act of production provided authenticating information, the fifth amendment would permit the use of this information against Brown personally at any subsequent trial, because he had provided it as a representative of the artificial entity, rather than in his personal capacity.²⁷⁵

Relying on the Supreme Court decision in *Schmerber v. California*,²⁷⁶ as amplified by *Fisher* and *Doe*, the Third Circuit found irrelevant the nature of the entity holding the documents.²⁷⁷ The critical issue, in its view, was whether compulsion of arguably incriminating disclosures is "communicative or noncommunicative."²⁷⁸

The *Brown* court also placed critical reliance on *Curcio*, interpreted in light of subsequent fifth amendment case law. In *Curcio*, the Supreme Court held that a custodian of union records could not be required to answer questions before the grand jury concerning the whereabouts of records that he claimed were not in his possession, because this would compel him "to disclose the contents of

²⁷³ 768 F.2d 525 (3d Cir. 1985) (en banc).

²⁷⁴ The subpoena required Brown to produce documents concerning named individuals "relating to accounting services performed by you or under your supervision." *Id.* at 531 (Becker, J., concurring) (emphasis removed). Brown's response would authenticate the documents both with respect to his company and with regard to his preparation of them. In *In re Grand Jury Empanelled 3-23-83*, 773 F.2d 45, 47 (3d Cir. 1985), however, the Third Circuit made clear that its holding in *Brown* did not depend upon the phrasing of the particular subpoena, which had required especially clear authenticating evidence. No issue concerning the existence of the documents was raised in *Brown*.

²⁷⁵ *Brown*, 768 F.2d at 526.

²⁷⁶ 384 U.S. 757 (1966). The court in *Brown* concluded that the Supreme Court's modern treatment of the fifth amendment began with its decision in *Schmerber*, where it drew the distinction between non-communicative acts outside the privilege and those protected by it, "which, by their nature, require the direct manifestations of an individual's thoughts." *Brown*, 768 F.2d at 526.

²⁷⁷ *Brown*, 768 F.2d at 528.

²⁷⁸ *Id.*

his own mind.”²⁷⁹ Because the act of production is now recognized as clearly communicative, the Third Circuit concluded that requiring the production of documents by the custodian would also violate the privilege.²⁸⁰ The court acknowledged statements in *Curcio* approving the rule that a custodian must produce records of an artificial entity even when there is a threat of personal incrimination, but it labeled those statements as dicta at odds with the opinion’s reasoning and basic holding.²⁸¹

From the perspective of current understanding of the fifth amendment, starkly differentiating oral testimony from that inherent in the production of documents seems highly questionable. In *Brown*, the Third Circuit suggested a rationalization of that result—the Supreme Court in *Curcio* intended to protect all communicative conduct, but simply did not yet fully understand that the act of production is potentially communicative.²⁸²

The Third Circuit noted a number of mechanisms through which law enforcement could achieve its goals despite this ruling. Both the required records doctrine, which permits the government to require that certain records be created and produced, and the rule that collective entities themselves have no fifth amendment privileges remained viable alternatives.²⁸³ The government could also grant use immunity. Finally, most business entities would have agents without valid self-incrimination concerns who could authenticate their records, and courts have the power to order the appointment of such agents.²⁸⁴ Stressing these alternatives, the court

²⁷⁹ *Curcio*, 354 U.S. at 128.

²⁸⁰ See *Brown*, 768 F.2d at 527.

²⁸¹ *Id.* But see *id.* at 537-38 (Garth, J., dissenting). In *In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum*, 611 F. Supp. 16 (S.D. Fla. 1985), the district court reached the same conclusion as the Third Circuit in *Brown*. The government admitted that it intended to use the act of production to authenticate the documents and that it had no other means of doing so. *Id.* at 22. As in *Brown*, the court relied heavily upon *Curcio* and held that production would threaten self-incrimination of the individual custodians through authentication. *Id.* at 22-23. Its approach differed from the Third Circuit’s in one curious way. It permitted production of the documents and specifically authorized their use against the corporation, which had no fifth amendment rights, but ruled, on the other hand, that the government could not use the act of production and any oral testimony about the documents against the custodians personally. *Id.* at 24-25. The result is inconsistent with the holding of *Doe* that the district courts may not fashion judicial use immunity. See *Doe*, 465 U.S. at 616-17.

²⁸² See *Brown*, 768 F.2d at 527-28.

²⁸³ *Id.* at 528-29.

²⁸⁴ *Id.* The court cited *Rogers Transportation, Inc. v. Stern*, 763 F.2d 165 (3d Cir. 1985)

made clear that "convenience to prosecutors" was not a sufficient justification for requiring incriminating communicative conduct.²⁸⁵

The cases from these two circuits demonstrate that the act-of-production doctrine is fully adequate to reconcile the public interest in obtaining relevant documents from powerful economic organizations with the personal rights of organizational representatives and employees. Carefully applied, the act-of-production doctrine should make the artificial entities exception largely irrelevant. More significantly, where the exception is not irrelevant, it produces results that are erroneous under any analysis faithful to the policies underlying contemporary fifth amendment doctrine.

III. SECONDARY CONCEPTS RENDERED OBSOLETE BY THE ACT-OF-PRODUCTION DOCTRINE

Over the past several decades, courts have developed a number of secondary tests in an effort to make the then-current theory of the fifth amendment respecting subpoenas concrete and operational. As the theories animating the fifth amendment have changed, these secondary concepts have become obsolete. In some instances these doctrines have little impact, but in others they affirmatively distort the proper application of our current understanding of the privilege against self-incrimination.²⁸⁶ Neverthe-

(en banc), in support of the district court's right to require the corporation to appoint an agent to produce documents. In that case, the witness questioned whether the court could require appointment of an agent if no other employee had independent knowledge of the records, thus forcing the witness to incriminate himself indirectly by providing information to the new agent. *Id.* at 167-68. The court was able to avoid the issue because two knowledgeable witnesses were available, and the government was willing to give them immunity. *Id.* at 168-69; see *supra* note 268 and accompanying text.

²⁸⁵ *Brown*, 768 F.2d at 529.

²⁸⁶ Combining the attorney-client privilege with the fifth amendment is, by contrast, in perfect agreement with modern theory. Indeed, the need to combine the privileges is an almost necessary outgrowth of the act-of-production doctrine. In *Fisher*, the Court rejected the argument that the attorney can vicariously assert the fifth amendment privilege of his client. When the subpoena is directed to the attorney, no compulsion is exerted against the client, and therefore, the fifth amendment cannot be violated. *Fisher v. United States*, 425 U.S. 391, 397 (1976); accord *United States v. Couch*, 409 U.S. 322, 328-29 (1973); *United States v. Davis*, 636 F.2d 1028, 1039 (5th Cir. Unit A Feb.), cert. denied, 454 U.S. 862 (1981); *In re Grand Jury Empanelled Feb. 14, 1978 (Markowitz)*, 603 F.2d 469, 472 n.3, 475 (3d Cir. 1979). The fact that the attorney is an agent of the client does not suffice to implicate the fifth amendment. *Fisher*, 425 U.S. at 397-98; accord *Beckler v. Superior Court*, 568 F.2d 661, 662 & n.1 (9th Cir. 1978). The defendant's privilege against self-incrimination may shield the document, however, if it would have been protected by the fifth amendment in his

less, these concepts remain. This part contends that these useless

hands and if it was transferred under circumstances protected by the attorney-client privilege. *Fisher*, 425 U.S. at 404-05.

Several consequences flow from the fact that the fifth amendment does not directly protect production of documents from the attorney. First, whether the document is protected becomes a matter not only of fifth amendment law but also of the statutory and common law of the attorney-client privilege. See *Beckler*, 568 F.2d at 662 (state court ruling that documents may be subpoenaed from attorney not reviewable on federal habeas corpus because attorney-client privilege is matter of state law and does not have constitutional dimensions); *Briggs v. Salcines*, 392 So. 2d 263, 266 n.2 (Fla. Dist. Ct. App. 1980) (attorney-client privilege is matter of state law and *Fisher's* construction of its protection need not be followed), petition for reversal denied, 397 So. 2d 779 (Fla.), cert. denied, 454 U.S. 815 (1981).

Second, the attorney-client privilege incorporates the requirements of the fifth amendment into the determination of its scope. See *Beckler*, 568 F.2d at 662 n.2. Indeed, the scope of the attorney-client privilege is expanded by that of the self-incrimination privilege. This expansion is the only way that analysis of the two privileges, when combined, differs from separate determinations of their availability. Although the communication to the attorney involved in the transfer must be testimonial and confidential to trigger the fifth amendment, there is no requirement that the items transferred be either. These principles differ from those of the attorney-client privilege, and as a result, a number of courts have erred in their application.

The easiest way to appreciate the difference is to note that documents may be protected by the attorney-client privilege in two different ways. First, the privilege applies to communications, which may be oral or written, between attorney and client for the purpose of legal advice. When the communication is writing generated for the purpose of providing information to the attorney so that he may give legal advice, the document is protected directly by the attorney-client privilege without resort to the fifth amendment. See *Davis*, 636 F.2d at 1040-41; *United States v. Schenectady Savings Bank*, 525 F. Supp. 647, 651-53 (N.D.N.Y. 1981). These cases draw a distinction between documents created as communication between attorney and client, which need not be protected by the fifth amendment, and preexisting documents, which must be protected by the privilege against self-incrimination before transfer to the attorney. Documents containing confidential communications between lawyer and client have broader protection under the attorney-client privilege than under the act-of-production doctrine; the contents themselves are privileged. See *Burnett v. State*, 642 S.W.2d 765, 770-71 (Tex. Crim. App. 1982) (en banc). Such documents, however, must be communicative and confidential, or they are not protected.

When the attorney-client privilege is combined with the fifth amendment, other rules operate. The first issue is whether the document would have been protected in the hands of the defendant if he had retained it. Although confidentiality vis-à-vis the government is something of a requirement—lest possession and existence of the document become a foregone conclusion—the sort of confidentiality required by the attorney-client privilege does not apply to the fifth amendment. In *re Vanderbilt* (Rosner-Hickey), 57 N.Y.2d 66, 78 n.6, 439 N.E.2d 378, 385 n.6, 453 N.Y.S.2d 662, 669 n.6 (1982). Also, the item need not itself be communicative or authored by the defendant.

The only communication to which the privilege applies is that involved in the act of production—an implicit statement communicating authentication, possession, or existence of the document. See *In re Katz* (Jamil v. United States), 623 F.2d 122, 126 (2d Cir. 1980) (“While the instrument may be a public document, [the defendant’s] interest in or relation to the document may well have been confidentially divulged, and its compelled surrender by

and outdated doctrines should be eliminated so as to focus analysis more directly on the fundamental issue of when production of documents entails testimonial self-incrimination.

A. *Appointment Calendars and Diaries*

A number of historical elements of the fifth amendment come together in the treatment of appointment calendars or "diaries"²⁸⁷ used by corporate executives. The complication arises chiefly from the fact that these documents contain both personal and business-related matters. The principal issue is whether they are personal and covered by the fifth amendment, or corporate and automatically excluded from the privilege under the artificial entity exception.²⁸⁸ Because of the absolute protection afforded to personal documents, litigants have understandably attempted to characterize business documents as "personal," and the courts, just as understandably, have been reluctant to agree. Any area of the law where so much turns upon technical characterization fosters arbitrary distinctions. The problems here are even more pronounced because the Supreme Court, by repeatedly altering its view of the fifth amendment theory applicable to documents, has created competing and conflicting lines of analysis.

Direct application of the act-of-production analysis should supplant the secondary concern of whether the documents are personal or corporate in nature. First, are the documents identified with sufficient objectivity and particularity that the witness need make no subjective selection that would provide testimonial information? Is authentication a foregone conclusion? Second, is acknowledging possession of the documents directly or indirectly incriminating? Is possession also a foregone conclusion? Third, does the government have specific evidence to establish the existence of the documents? These inquiries, not whether the documents are

his attorney *per se* may constitute a testimonial communication that tends to incriminate him.")). The act of production must be communicative, and it must be undertaken confidentially, but the content of the item must be neither communicative nor strictly confidential. And for the act of production to be both communicative and confidential, the defendant need not have prepared the document.

²⁸⁷ The term "diary" is somewhat misleading, because the documents contain a listing of meetings rather than the author's inner thoughts.

²⁸⁸ This distinction is longstanding. See, e.g., *Wilson v. United States*, 221 U.S. 361 (1911).

personal or corporate, best reflect the central concerns of contemporary fifth amendment analysis.

The lower court cases in this area are contradictory, largely because of continued reliance on factors whose significance is unclear and whose relevance to any theory of the fifth amendment is tenuous. In *In re Grand Jury Investigation (Brown)*,²⁸⁹ for instance, the witness argued that his appointment book, which his secretary helped to maintain and which contained both business and personal matters, was personal because the corporation did not provide it or require him to keep, use, or retain it. But the court found the book to be a business document because it had been in the constructive possession of the corporation in its offices, rather than in the home of the witness, and because some type of appointment book was necessary for the witness to perform his business duties.²⁹⁰

In *In re Grand Jury Proceedings (Moore)*,²⁹¹ the court relied on many of the same factors. In determining that the calendar in issue was a business document, the court placed primary emphasis on the fact that its contents were predominantly business-related rather than personal and that maintaining a calendar was necessary for the discharge of the witness' corporate duties. The court rejected the defendant's custody, control, or authorship as decisive factors, and stressed the fact that according protection to the documents would impede effective law enforcement. Allowing corporate officers to shield such documents by interspersing personal information or by maintaining personal custody of them, the court reasoned, would thwart effective investigation.²⁹²

Other courts have relied principally on different factors. In *United States v. Mandel*,²⁹³ the court focused on the fact that the records were owned by the partnership under state law and used by other employees for business purposes.²⁹⁴ In *United States v.*

²⁸⁹ 338 F. Supp. 1379 (W.D. Pa. 1972).

²⁹⁰ *Id.* at 1380.

²⁹¹ 349 F. Supp. 417 (N.D. Ohio 1972).

²⁹² *Id.* at 418-19; see also *United States v. Peter*, 479 F.2d 147, 149 (6th Cir. 1973) ("Appellant could not clothe the records of his two corporations with immunity by mingling them with his personal records.").

²⁹³ 437 F. Supp. 258 (D. Md. 1977), *aff'd* in part, vacated and remanded in part on other grounds, 591 F.2d 1347 (4th Cir.), *aff'd*, 602 F.2d 653 (4th Cir. 1979) (*en banc*), cert. denied, 445 U.S. 961 (1980).

²⁹⁴ *Id.* at 261.

Waltman,²⁹⁵ the court concluded that the decisive factor was that the diary had been submitted to the corporation to substantiate business expenses and secure reimbursement.²⁹⁶ By contrast, in *United States v. MacKey*,²⁹⁷ the defendant never submitted his "Brooks Brothers diary and a desk-type calendar," which he owned and exclusively maintained, to the corporation for any purpose.²⁹⁸ The court nevertheless found the items to be corporate in nature because they "were kept in his office . . . and used by him in the day-to-day management of the corporation."²⁹⁹

Although these cases lack coherence in terms of either fifth amendment theory or the factors they rely upon to find the documents corporate in nature, they reach a common result: they hold that appointment books and diaries that contain corporate business are outside the protection of the fifth amendment.³⁰⁰ Other courts have, however, reached a different conclusion.

In *In re Grand Jury Proceedings (Johanson)*,³⁰¹ the government subpoenaed appointment books and diaries concerning certain named corporations and individuals. The district court quashed the subpoenas insofar as they required production of Johanson's "pocket-size appointment books," which the court found to be his personal papers.³⁰² The Third Circuit agreed: "These books were his own, kept on his person, with all entries recorded by him, not by third persons. We believe he had a rightful expectation of privacy with regard to these papers."³⁰³ The court's opinion, however,

²⁹⁵ 525 F.2d 371 (3d Cir. 1975).

²⁹⁶ *Id.* at 373.

²⁹⁷ 647 F.2d 898 (9th Cir. 1981).

²⁹⁸ *Id.* at 899.

²⁹⁹ *Id.* at 901.

³⁰⁰ Indeed, in *MacKey*, the Ninth Circuit described the results in the reported cases as follows: "[M]ixed documents are corporate and outside the privilege." 647 F.2d at 900. Other courts have simply placed the burden on the witness to demonstrate that such documents are personal. See *Waltman*, 525 F.2d at 373 (once government has established prima facie case that documents are corporate, witness must rebut that proposition); *United States v. Peter*, 479 F.2d 147, 149 (6th Cir. 1973) (witness cannot place the burden on the government of unscrambling records containing both personal and business entries); *Brink v. DaLesio*, 82 F.R.D. 664, 668 (D. Md. 1979) ("[N]o evidence has been presented to show that it is sufficiently unrelated to his union activities so as to constitute a personal rather than business record.").

³⁰¹ 632 F.2d 1033 (3d Cir. 1980).

³⁰² *Id.* at 1037.

³⁰³ *Id.* at 1044.

is not very helpful in resolving the major issues presented by such appointment books, because it does not directly address the argument that these records may have been corporate in nature and largely ignores the act-of-production analysis. Rather, its animating fifth amendment principle seems to be the protection of a reasonable expectation of privacy in personal communications even when they have been voluntarily committed to writing.³⁰⁴

The Second Circuit has been the only court to undertake an examination of how fifth amendment theory and the act-of-production doctrine might apply to determining whether such calendars are personal or business in nature. In *In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*,³⁰⁵ the government subpoenaed from the assistant treasurer of a corporation “[a]ll original pocket calendars and desk calendars reflecting business appointments” over a six-year period.³⁰⁶ The court acknowledged that the issue was principally one of categorizing the documents as personal or corporate.³⁰⁷ Rather than applying some abstract test, however, the court looked to the language of the fifth amendment as a “lodestar”:

Thus, in determining whether the documents are personal or corporate, the issue is whether by requiring their production, the witness is being compelled to testify against himself. The following nonexhaustive list of criteria is relevant to this determination: who prepared the document, the nature of its contents, its purpose or use, who maintained possession and who had access to it, whether the corporation required its preparation, and whether its existence was necessary to the conduct of the corporation’s business.³⁰⁸

The relevant facts were not in the record, however, so the appellate court was forced to remand for further findings.³⁰⁹

³⁰⁴ The district court found a fifth amendment violation because production would authenticate the books. See *id.* at 1037. The court of appeals, however, used much broader language consistent with *Boyd*’s absolute protection of private papers, albeit based on modern principles of privacy rather than on the property rationale of *Boyd*’s age. *Id.* at 1043.

³⁰⁵ 657 F.2d 5 (2d Cir. 1981).

³⁰⁶ *Id.* at 7.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 8.

³⁰⁹ On the one hand, the court suggested that concepts of privacy, possession, and access might prove critical. It noted that the witness “alone prepared and maintained the pocket diaries, kept them in his sole possession, and was the only person having access to them,” whereas his secretary also had access to and made entries in his desk calendar. *Id.* On the

On remand, the district court attempted to fashion a theory of how these factors related to fifth amendment principles.³¹⁰ It focused upon the Supreme Court's opinion in *Bellis v. United States*,³¹¹ from which it derived three criteria that justified the distinction between personal and corporate papers: (1) "subpoenas for non-private papers do not involve the coerced personal testimony historically protected by the fifth amendment"; (2) access to business papers is less of a threat to privacy than access to personal documents; and (3) obtaining business documents is more important than securing private papers in policing collective activity.³¹²

Applying these factors and looking to the specific issues identified by the Second Circuit, the district court found that the desk calendars were corporate in nature. First, they were used primarily for corporate business, their contents were overwhelmingly corporate, and they were extremely useful—if not absolutely necessary—to the conduct of corporate business. Second, although the corporation did not require the use of desk calendars, it did provide them to corporate employees. Third, though the witness ultimately took custody of the calendars at year's end, during the course of the year they were left open on his desk, accessible to numerous employees and specifically to his secretary, who occasionally made entries in them. Finally, the corporation had ownership and access rights to the calendars.³¹³

The district court found the pocket calendars, on the other hand, to be personal. As an initial matter, it rejected the government's argument that personal calendars become corporate in nature if used for corporate affairs, asserting in conclusory fashion that what is private does not change character because corporate

other, it suggested that whether the contents were primarily personal or business-related might prove the decisive factor. *Id.* at 8-9.

³¹⁰ See *In re Grand Jury Subpoena Duces Tecum* Dated Apr. 23, 1981, 522 F. Supp. 977 (S.D.N.Y. 1981).

³¹¹ 417 U.S. 85 (1974).

³¹² *In re Grand Jury Subpoena Duces Tecum* Dated Apr. 23, 1981, 522 F. Supp. 977, 980 (S.D.N.Y. 1981).

³¹³ *Id.* at 982-83. Why the court looked to several of these factors is unclear, because earlier in its opinion it suggested that corporate ownership, custody, and access, as well as whether the corporation or others required the records to be kept, were not central to the Supreme Court's analysis. Rather, it thought the Court had concentrated on the "nature" of the documents and "the capacity in which they are held." *Id.* at 981.

material has been included.³¹⁴ The court then turned to more concrete considerations. The calendars were owned by the witness, and the corporation did not encourage their use. They contained far more personal entries than the desk calendars, though they also contained many business-related notations; they were maintained exclusively by the witness and kept on his person at all times; no one else, not even the witness' secretary, had access to them; and though the secretary knew of their existence, she was not familiar with their contents. Finally, the books' hard covers and small size were conducive to privacy.³¹⁵

The district court's decision was more sensitive to fifth amendment concerns than most opinions, but its categorization was almost as arbitrary. And the Second Circuit, though it had identified the proper inquiry—whether production requires testimonial conduct that threatens incrimination—set forth specific factors that had no necessary connection to that inquiry. Moreover, the Second Circuit continued to focus on the corporate or private nature of the documents, which remains largely irrelevant to the substantive fifth amendment issues. The end result was a district court opinion that combined elements of property and privacy analysis.

Some of the questions asked by the Second Circuit have relevance to the proper inquiry. The inadequacy lies, rather, in the court's failure to provide any theoretical basis with which to determine the significance of the answers. For instance, who prepared, had access to, and possessed the documents is relevant to: (1) whether production would authenticate the calendars; (2) whether their existence, possession, or authentication is a foregone conclusion; and (3) whether production would exert compulsion on the

³¹⁴ Id. at 984-85. The court fit its conclusion into the three elements of *Bellis* it found critical. First, private calendars were not important to effective regulation of corporations. Second, their disclosure was likely to intrude upon privacy. Third, their compelled production was "strongly akin" to the abuses that produced the fifth amendment. Id. at 984.

Other opinions, such as *MacKey*, 647 F.2d at 900, have begged the same question but reached the opposite conclusion, determining that use for corporate purpose means that the document is not private.

³¹⁵ In re Grand Jury Subpoena Duces Tecum Dated Apr. 23, 1981, 522 F. Supp. 977, 984-85 (S.D.N.Y. 1981) The court suggested that some corporate notations in the private calendar might be obtained—such as those that would provide the basis for establishing corporate tax allocation—whereas others, such as a reminders to the individual about corporate appointments, would not be subject to production. Id. at 985-86. The basis on which the court drew these distinctions is entirely unclear.

witness. This sort of connection was left unarticulated by the court in *April 23 Subpoena*.

This article's proposed method of analysis should not change the results in many of the reported cases; most calendars should be produced under either approach. Production of the desk calendar in *April 23 Subpoena*, for example, could be compelled under the proposed analysis. Whether the pocket calendars would similarly be subject to subpoena is unclear, but they might well be producible because of the secretary's knowledge of their description and existence.

B. Defining Artificial Entities

In *Bellis*, the Supreme Court identified two critical issues in deciding when an institutional representative should be denied the right to use his personal fifth amendment privilege to resist a subpoena for the institution's documents. First, the organization for which the custodian works must have a certain character—it must be a collective entity.³¹⁶ Second, the custodian must hold the records in a representative—rather than personal—capacity.³¹⁷ The Court also noted two policy concerns that support denial of the privilege when a collective entity is involved. First, recognition of the custodian's privilege would thwart effective law enforcement against the entity, which cannot directly claim the privilege.³¹⁸ Second, records of artificial entities are not part of the individual's "inner sanctum"; they enjoy no substantial claim of privacy or confidentiality because access is guaranteed to others.³¹⁹

³¹⁶ *Bellis*, 417 U.S. at 88.

³¹⁷ *Id.* The Court's statement suggests that both conditions must be present to void the privilege. Some subsequent lower court cases, however, have found that satisfaction of either test eliminates fifth amendment protection. Holding the records in a representative capacity may be sufficient to void the privilege regardless of the nature of the organization. See, e.g., *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 945 (10th Cir.) (attorney may not assert fifth amendment for client files if client does not object to production because the files belong to client and are held by the attorney only in a representative capacity), cert. denied, 469 U.S. 819 (1984). But see *In re Kave*, 760 F.2d 343, 357-58 (1st Cir. 1985) (attorney may claim privilege for client's documents because she operated as a sole proprietorship and under state law she owned them). When the organization has an institutional existence separate from its members, the fifth amendment has been held inapplicable even when its members have agreed to limit access to only one member. See *In re Grand Jury Impaneled Jan. 21, 1975 (Freedman)*, 529 F.2d 543, 547-48 (3d Cir.), cert. denied, 425 U.S. 992 (1976).

³¹⁸ *Bellis*, 417 U.S. at 90.

³¹⁹ *Id.* at 91-92. Privacy is lost only when the organization "is recognized as an indepen-

The tests the Court has articulated for determining when an enterprise is a collective entity, however, fail to implement these policy concerns. Instead, the Court has created yet another set of arbitrary and archaic categories. The results reached by the application of these tests are not so unpredictable as to prove unworkable, but the tests themselves are based on outmoded concepts—property rights, visitorial powers, and privacy—that bear little relationship to significant fifth amendment values.

Application of these tests to partnerships demonstrates their conflicting and largely irrelevant nature. In *Bellis*, the Court held that a three-member law partnership with six additional employees was an artificial entity.³²⁰ The several factors that the Court indicated led it to that determination suggested that it would consider most partnerships collective entities, although it specifically identified circumstances in which a partnership might still enjoy fifth amendment protection.

One important factor is size; large size alone will often preclude fifth amendment protection. The Court apparently believes that partnerships that are “large, impersonal, highly structured enterprises of essentially perpetual duration” are indistinguishable from corporate structures and should be treated accordingly.³²¹ On the

dent entity apart from its individual members.” *Id.* at 92. This characteristic was described by the lower court as “a recognizable juridical existence apart from its members.” *In re Grand Jury Investigation (Bellis)*, 483 F.2d 961, 962 (3d Cir. 1973), *aff’d sub nom. Bellis v. United States*, 417 U.S. 85 (1974). The entity must be “relatively well organized and structured, and not merely a loose, informal association of individuals.” *Bellis*, 417 U.S. at 92-93. The organization must also maintain a “distinct set of organizational records” to which its members have access. *Id.* at 93.

³²⁰ *Bellis*, 417 U.S. at 95-97. The records at issue were partnership financial records that were prepared by the witness’ secretary under his direction and had been maintained in his office prior to the dissolution of the firm. *Id.* at 85-86.

³²¹ *Id.* at 93-94. The Court noted that the lower courts had often treated such partnerships as collective entities. *Id.* at 94; see also *In re Sept. 1975 Special Grand Jury*, 435 F. Supp. 538, 543 (N.D. Ind. 1977) (prior to *Bellis*, fifth amendment generally held applicable to partnership records except where they “involved large impersonal organizations whose identity was obviously separate from the individual partners”).

In these circumstances, the Court stated, “the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise.” *Bellis*, 417 U.S. at 101.

The same logic should result in denial of the privilege to large sole proprietorships. But subsequent lower court cases have held that the records of sole proprietorships are protected even when the organization is large. See, e.g., *In re Grand Jury Empanelled Mar. 19, 1980*, 680 F.2d 327, 330-31 (3d Cir. 1982), *aff’d in part and rev’d in part sub nom. United States v. Doe*, 465 U.S. 605 (1984); *In re Grand Jury Empanelled Feb. 14, 1978*, 597 F.2d

other hand, small size does not necessarily mean that the privilege is applicable—the *Bellis* Court rejected the argument that a law firm was indistinguishable from its three partners merely because it was small.³²²

The Court was unwilling, however, categorically to deny fifth amendment protections to all partnerships and stated that partnerships “might” be entitled to protection in certain special cases.³²³ It gave two examples: a small family partnership and one in which the partners had a preexisting confidential relationship.³²⁴ Both reflect the Court’s concern for privacy; in each, confidentiality might be expected to exist in spite of the business’ separate legal existence.³²⁵ The Court also suggested that “an informal association or a temporary arrangement for the undertaking of a few

851, 859 (3d Cir. 1979). But see *In re Witness Before the Grand Jury (Marlin)*, 546 F.2d 825, 827 (9th Cir. 1976) (where records of large sole proprietorship were prepared by employees so as to eliminate expectation of privacy and were “inextricably related” to the activities of other partnerships, witness would not be permitted to claim privilege). The justification for this different treatment is that the sole proprietorship has no legal existence separate from the owner and therefore the records cannot be held in a representative capacity even though the organization may well be impersonal and lacking in privacy and confidentiality. See *Feb. 14 Grand Jury*, 597 F.2d at 859.

³²² In reaching this conclusion, the Court was forced to reject the threshold test for collective entities—whether the organization “has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.” *United States v. White*, 322 U.S. 694, 701 (1974). The *Bellis* Court noted the difficulty of applying this test, because organizations usually will involve both personal and group interests. *Bellis*, 417 U.S. at 100. Instead, the Court opted for the more mechanical test of whether the organization had an independent legal existence and the records were held in a representative capacity. Where those conditions are met, the Court reasoned, “insubstantial difference[s] in the form of the business enterprise” should not produce a different result in terms of the availability of the privilege. *Id.* at 101.

³²³ *Bellis*, 417 U.S. at 101.

³²⁴ *Id.*

³²⁵ More concretely, *Bellis* cited *United States v. Slutsky*, 352 F. Supp. 1105 (S.D.N.Y. 1972), as providing an example of a partnership that might be excluded from the collective entity rule. That partnership consisted of two brothers who operated a resort grossing over \$4,000,000 per year. The partners personally managed the operation, although they employed a number of unrelated employees. The district court, in holding that the partnership did not fall within the collective entity doctrine, concentrated on the personal involvement of the partners in the operation of the business and the small, intimate nature of the ownership group. *Id.* at 1108. Also, the records under subpoena were produced by the accountant, who was a partnership employee rather than an independent contractor. *Id.* at 1109. But even given such facts, under the *Bellis* tests the partnership in *Slutsky* should have a separate institutional identity.

projects of short-lived duration" might not constitute an artificial entity.³²⁶

The cases since *Bellis* reveal that there is virtually no content to the Court's suggestion that some partnerships are not artificial entities, for every partnership will usually satisfy at least one of the *Bellis* criteria. Despite the Court's specific suggestion that small family partnerships might be treated differently, the lower courts have generally found that the existence of any partnership arrangement eliminates the privilege.

In *United States v. Mahady & Mahady*,³²⁷ for example, the Third Circuit held that the financial records of a law partnership made up of four brothers were outside the privilege, because a formal partnership "has an institutional identity, and a partner holds the records in a representative, and not a personal capacity."³²⁸ The Third Circuit found the small family partnership exception of *Bellis* inapplicable, though it offered no explanation for that finding and appeared to question the validity of the exception itself.³²⁹

The partnership at issue in *In re September, 1975 Special Grand Jury*³³⁰ also possessed many of the characteristics that under *Bellis* should have excepted it from the collective entity category—it was composed of a husband and wife, who operated a trailer park without any written partnership agreement. But the

³²⁶ *Bellis*, 417 U.S. at 95-96. The partnership in *Bellis*, which had an "established institutional identity" by virtue of its 15 years of existence, *id.*, was clearly not within this category.

Though not possessing all the attributes of an entity separate from its members, a partnership is recognized as a distinct entity for numerous purposes. Without specifying the degree of legal separateness required under the fifth amendment, the Court found the partnership in *Bellis* sufficiently separate under state law to constitute a distinct entity. *Id.* at 97 & nn.6-7. State partnership law imposed—absent contrary agreement by the partners—a certain organizational structure, restrictions on personal use of partnership assets, and access to its records. *Id.* at 96, 98-99. In addition, the Court noted that the partnership maintained a visibly independent existence with regard to the outside world—it had a bank account and stationery, and held itself out to third parties as a partnership. *Id.* at 96-97.

³²⁷ 512 F.2d 521 (3d Cir. 1975).

³²⁸ *Id.* at 524.

³²⁹ "Whatever the full import [concerning small family partnership exception] of the quoted statement may be we do not think it applicable in the present context." *Id.*

Similarly, in *United States v. Hankins*, 565 F.2d 1344 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979), the United States Court of Appeals for the Fifth Circuit, without apparent concern for the size or family character of a partnership composed of two brothers, stated that a subpoena served upon either would not have violated the fifth amendment. *Id.* at 1349. Upon the death of one brother, the court held the fifth amendment inapplicable to the records because business was conducted together with the deceased brother's heirs. *Id.*

³³⁰ 435 F. Supp. 538 (N.D. Ind. 1977).

district court held that the partnership had a separate institutional identity and thus was not entitled to the protection of the fifth amendment.³³¹ The court observed that under state partnership law, the fact that the partners were married did not change access to the partnership's records or regulation of the partnership relationship.³³² Even though state law recognized a confidential relationship between the partners under the husband-wife privilege, the court found the suggested exception for small family partnerships and prior confidential relationships inapplicable because the evidentiary privilege was not of constitutional stature.³³³

³³¹ Id. at 545-46.

³³² Id. at 543.

³³³ Id. at 544-45. Like the court in *Mahady*, the district court questioned whether the exception would ever be applicable. Id. at 544.

The court cited several other factors to show that the partnership was separate from the individuals and that the relationship was not confidential. It noted that the petitioner conducted some personal business distinct from the trailer park and maintained separate personal books, id. at 543, and that no prior confidential relationship existed with regard to the enterprise because in previous years it had included additional partners who were related by neither blood nor marriage. Id. at 540, 545.

These arguments are typical of the "analysis" conducted by courts in this area. The factors examined, while loosely related to some arguably relevant concern, seem to be chosen almost randomly. Moreover, the courts provide no meaningful way to predict or even measure their impact in a given case. For instance, in *Bellis* the Court noted that partnerships are distinct entities under state law for some purposes and "bear enough of the indicia of legal entities to be treated as such for the purpose of our analysis of the Fifth Amendment issue presented in this case." *Bellis*, 417 U.S. at 97 n.7. The Court did not, however, indicate which legal attributes of the partnership might make a critical difference. Cf. *Reamer v. Beall*, 506 F.2d 1345, 1346 (4th Cir. 1974) (although professional corporations under state law do not possess all attributes of ordinary corporations, *Bellis* privilege is unavailable to them), cert. denied, 420 U.S. 955 (1975). The field of potential factors seems so numerous and malleable as to allow a court always to find some "significant" fact that will eliminate the privilege.

Similarly, in *In re Grand Jury Subpoenas Addressed to Sentinel Financial Instruments*, 553 F. Supp. 71 (S.D.N.Y.), aff'd mem., 714 F.2d 113 (2d Cir. 1982), cert. denied, 459 U.S. 1208 (1983), the court held that a limited partnership of which the witness was the sole general partner and 98% owner of the company—the other two percent being held by his daughter and brother—had an established institutional identity. Id. at 72. In support of its conclusion, the court stressed the existence of a written agreement. By contrast, in *Bellis* and *September 1975 Special Grand Jury*, no formal agreement existed, a fact not deemed critical.

The court in *Sentinel Financial Instruments* focused upon the lack of confidentiality—under state law the partner had lost the ability to control access to the records. Id. at 75-76. By contrast, in *In re Grand Jury Impaneled January 21, 1975* (Freedman), 529 F.2d 543, 547 (3d Cir.), cert. denied, 425 U.S. 992 (1976), the court found that a limitation on access to records, which would apparently supplant state partnership law, was ineffective because the partnership possessed objective characteristics of a typical law firm partnership.

By contrast, the court in *In re Grand Jury Subpoena Duces Tecum Dated November 13, 1984*³³⁴ found that a husband-wife partnership was not a collective entity. The decision recognized that “a ritualistic, mechanical application” of the *Bellis* test will almost invariably result in a holding that partnership records are never privileged,³³⁵ because almost all states heavily regulate partnerships, all partnerships must file tax returns, and the property of all partnerships is held in a representative capacity under applicable law.³³⁶ Nevertheless, the court held that a husband and wife operating a consulting firm from their home were the type of “Mom and Pop” operation that *Bellis* intended to enjoy fifth amendment protection. To hold otherwise, it reasoned, would mean that no partnership would ever be excluded from the artificial entity concept.³³⁷

Examination of the results of these cases demonstrates just how far the lower courts’ analysis has strayed from fifth amendment goals. Production of records of the smallest corporation—and, in

The recent decision in *In re Two Grand Jury Subpoenae Duces Tecum Dated August 21, 1985*, 793 F.2d 69, 72 (2d Cir. 1986), held that the witness’s law practice was a collective entity prior to its incorporation. The court concluded that the magnitude of the firm’s business and the manner in which it divided its revenues indicated a partnership-like structure. The court also relied on the fact that the firm held itself out to the public and the legal community as a partnership prior to its incorporation; the court gave these public representations weight because false assertions would have constituted a violation of the code of professional ethics. *Id.* In contrast, the court in *In re Special Grand Jury No. 1, Impanelled December, 1977 Term*, 465 F. Supp. 800 (D. Md. 1978), concluded that two brothers who practiced law together were not partners but were rather “an unstructured and loose association of two individual practitioners of law.” *Id.* at 806.

³³⁴ 605 F. Supp. 174 (E.D.N.Y. 1985).

³³⁵ *Id.* at 176.

³³⁶ *Id.* at 176-77.

³³⁷ *Id.* at 177-78. Only one other post-*Bellis* case has found that partnership records are arguably protected by the fifth amendment. See *In re Special Grand Jury No. 1, Impanelled Dec., 1977 Term*, 465 F. Supp. 800 (D. Md. 1978), discussed *supra* note 333.

New York has created a separate category of artificial entities—the medical entity. Because of extensive state regulation, hospitals and nursing homes—even if small family partnerships—are artificial entities. See *Sigety v. Hynes*, 38 N.Y.2d 260, 268, 342 N.E.2d 518, 523, 379 N.Y.S.2d 724, 731-32 (1975), cert. denied, 425 U.S. 974 (1976); cf. *Sreter v. Hynes*, 419 F. Supp. 546, 549 (E.D.N.Y. 1976) (applying New York law). Indeed, it appears that even a sole proprietorship, if engaged in a medical enterprise, becomes a collective entity. See *People v. Doe*, 90 A.D.2d 669, 455 N.Y.S.2d 866, 867 (1982), *aff’d* on other grounds, 59 N.Y.2d 655, 450 N.E.2d 211, 463 N.Y.S.2d 405 (1983). Although it borrows from the required records concept, see *supra* notes 202-40 and accompanying text, the medical enterprises exception constitutes a separate category of artificial entity. See *Cappetta v. Santucci*, 42 N.Y.2d 1066, 1067, 369 N.E.2d 1172, 1173, 399 N.Y.S.2d 638, 639 (1977).

practice, the smallest partnership—lies outside the fifth amendment,³³⁸ whereas those of the largest sole proprietorship are protected as the personal records of the owner.³³⁹ Thus, meaningless reconstitutions of organizational form can radically alter the fifth amendment status of identically produced records.³⁴⁰

The distinctions drawn by the courts may help to determine when an institution has an identity apart from its members and when institutional documents are held in a representative capacity. Thus they have some utility in determining when the organization itself may be ordered to produce its records through a representative who has no fifth amendment privilege.³⁴¹ When, on the other hand, these concepts are used to define the rights of the individuals who compose the organization, they have little relevance to the important issues involved in the privilege against self-incrimination.³⁴² They bear no relation to the idea of compelled testimonial incrimination by an individual, and their impact on law enforcement is inconsistent. In using these concepts, the courts have substituted categorization for purposeful policy-oriented analysis.

³³⁸ See *In re Grand Jury Subpoena Addressed to Sentinel Fin. Instruments*, 553 F. Supp. 71, 72 (S.D.N.Y.), *aff'd mem.*, 714 F.2d 113 (2d Cir. 1982) ("Even the smallest of corporations—those consisting of only one shareholder—may not rely on the Fifth Amendment privilege."), *cert. denied*, 459 U.S. 1208 (1983).

³³⁹ *Id.*

³⁴⁰ See *In re Grand Jury Empaneled on Jan. 17, 1980*, 505 F. Supp. 1041, 1043 (D.N.J. 1981) (from the moment the partnership was dissolved and the business operated as a sole proprietorship, the records were within fifth amendment protection).

³⁴¹ As discussed above, see *supra* note 257, this is the only appropriate role of the artificial entity concept. When the organization has a separate existence from its owners, it can be ordered to supply a custodian who would not be incriminated by production of documents.

³⁴² Not only is the distinction between sole proprietorships and collective entities suspect when used as a basis for defining the scope of the constitutional rights of individuals, but its validity is also open to serious question as a basis for distinguishing between legal entities that have no existence separate from their members and those that are institutionally independent.

Judge Posner recently stated in *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985), that under § 1962(c) of the RICO statute, 18 U.S.C. § 1961-1968 (1982), a sole proprietorship is a "recognized legal entity," *id.* at 143, "practically . . . separable from the individual" if it has employees besides its owner, *id.* at 144; accord *United States v. Benny*, 786 F.2d 1410, 1415-16 (9th Cir. 1986). If this analysis is valid for general purposes of statutory construction, it seems appropriate to use when defining the rights and responsibilities of organizations under the fifth amendment. But see *(Under Seal) v. United States*, 634 F. Supp. 732, 735 (E.D.N.Y. 1986) (sole proprietorship, though a business, is not an artificial entity and cannot be ordered to provide a representative to produce documents).

C. *Protection of Documents in the Possession of a Third Party*

In *Couch v. United States*,³⁴³ the Supreme Court articulated a concept of "constructive possession" under which a witness may assert his fifth amendment rights when documents are subpoenaed not from his actual possession but from a third party. After *Fisher* and *Doe*, this doctrine serves no purpose relevant to fifth amendment analysis.³⁴⁴ Moreover, it stands as an impediment to the equal treatment of organizations of similar size but different legal form.³⁴⁵

Once privacy is recognized as insufficient in itself to invoke the privilege against self-incrimination, the only appropriate focus is on how the subpoena operates against the witness. If it does not compel him to perform an incriminating, testimonial act, it does not violate the fifth amendment even if he has an interest in the documents. The fact that he had constructive possession of the documents has no bearing on that inquiry except in the most truly extraordinary case.

In *Couch*, the IRS served a summons on the defendant's accountant that demanded production of business and tax records pertaining to her tax liability. *Couch* objected on the ground that production would violate her fifth amendment rights.³⁴⁶ She operated her business as a sole proprietor, so production of the records

³⁴³ 409 U.S. 322 (1973) (dictum).

³⁴⁴ The recognition that constructive possession plays no useful role in the analysis should have little impact upon the outcome of cases. When presented with the constructive possession argument, most courts have rejected it. See, e.g., cases discussed in *infra* note 369.

³⁴⁵ One effect of this post-*Fisher* view is to reduce the apparent difference in fifth amendment treatment between sole proprietorships, especially large ones, and collective entities, which may be quite small. Under even the most liberal reading of the privilege, the corporation itself has no privilege, and a subpoena directed to any employee having custody of the corporate documents who would not be incriminated by the act of production is outside its protection. Without a constructive possession doctrine applicable to the owner, most sizable sole proprietorships will have an employee who is familiar with and has access to the documents, and thus will be able to produce them. The only difference that might remain between these different business units is that the government would not necessarily be able to shift the burden to the sole proprietor to identify and provide an agent without a self-incrimination objection, as it can with the corporation under the law in several circuits. See, e.g., *United States v. Lang*, 792 F.2d 1235, 1240-41 (4th Cir.) (corporation may be ordered to provide witness to furnish documents), cert. denied, 107 S. Ct. 574 (1986); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985) (same); *(Under Seal) v. United States*, 634 F. Supp. 732, 735 (E.D.N.Y. 1986) (sole proprietorship may not be ordered to provide representative).

³⁴⁶ *Couch*, 409 U.S. at 323.

could not be compelled under the collective entity exception. Because she had also retained ownership of the records,³⁴⁷ she contended that *Boyd* entitled her to resist production under the fifth amendment.³⁴⁸ The Court was unwilling to rule that ownership was irrelevant, but it identified *possession* as the critical issue because it "bears the closest relationship to the personal compulsion forbidden by the fifth amendment."³⁴⁹ The Court also found privacy to have a significant bearing on the scope of the privilege,³⁵⁰ but concluded that the witness could have no fourth or fifth amendment claim for two reasons: "there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused."³⁵¹

Stating explicitly that actual possession was not necessary to assert a fifth amendment claim, the Court announced a doctrine of "constructive possession" that permitted the assertion of the privilege in such circumstances.³⁵² The Court gave several examples that suggested the contours of this doctrine. First, it implicitly rejected Couch's contention that under the government's position, "If I were helping you across Constitution Avenue by carrying your briefcase, the Government . . . could hand me a summons in

³⁴⁷ Id. at 324.

³⁴⁸ Id. at 331.

³⁴⁹ Id. The Court explicitly justified its focus on possession in these terms: "We do indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids." Id. at 336 n.20.

³⁵⁰ The Court relied on its earlier decision in *Perlman v. United States*, 247 U.S. 7 (1918), as authority that ownership alone was not sufficient to invoke the privilege; it read *Perlman* to rest on concepts of privacy. *Couch*, 409 U.S. at 332. But the *Perlman* opinion did not mention the term privacy, and any reliance upon that concept was unnecessary to its result. See *supra* note 185.

The Court also observed that Couch could have little expectation of privacy in records provided to an accountant for the purpose of preparing tax returns, because much of the information would necessarily be disclosed, at the discretion of the accountant, on her tax return. Id. at 335.

³⁵¹ *Couch*, 409 U.S. at 336.

³⁵² Several explanations suggest themselves for these statements that limit the scope of the holding. First, the Court's caution could reflect an understandable reticence to articulate an absolute rule applicable to unforeseen situations. See id. at 336 n.20. Second, the suggested limitation may be a natural result of the Court's reliance on a privacy rationale. Though loss of possession will tend to eliminate compulsion, it does not necessarily destroy a legitimate expectation of privacy. Third, the Court may have been unwilling to accept the full implications of a ruling that would obliterate, without qualification, the protection of documents that had been previously assumed secure from governmental access.

the middle of Constitution Avenue and seize your documents to use against you in a criminal trial.’”³⁵³ The opinion likewise suggested that the IRS might not “‘reach her records the instant those records leave her hands and are deposited in the hand of her retainer whom she has hired for a special purpose.’”³⁵⁴ This situation may be characterized as custodial safekeeping—the witness has entrusted his records to another for the exclusive purpose of storage with the reasonable expectation that they will remain confidential.³⁵⁵ Finally, the Court noted that the privilege could well apply where the chairman of the board of a corporation stored personal records in a safe in the company’s offices to which only he and an indicted co-defendant had the combination.³⁵⁶

Without definitively stating how it would rule on these examples, the Court took pains to note that actual possession was not a per se requirement for application of the fifth amendment. In the absence of actual possession, a fifth amendment claim could be asserted “where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.”³⁵⁷ On the facts before it, however, the Court found the constructive possession doctrine inapplicable, because the accountant had been in continuous possession of many of the documents for years³⁵⁸ and was not an employee of the witness but an independent contractor.³⁵⁹ This last point was significant for two reasons. First, when

³⁵³ Id. at 333 & n.15 (quoting statement at oral argument).

³⁵⁴ Id. at 333 (quoting Brief for Petitioner at 13, *Couch* (No. 71-889)).

³⁵⁵ The Court cited two cases as examples of fact situations that might fall within the constructive possession doctrine. One of those, *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956), fits within the custodial safekeeping category. *Schwimmer*, an attorney, had closed his office and placed his files, contained in four cardboard boxes and four filing cabinet drawers, in storage with a company. Id. at 858-59. The company had no interest in examining their contents; its only duty was to provide safe storage. The court held that under these circumstances *Schwimmer* “legally had such possession, control and unrelinquished personal rights in the books and papers” necessary to permit him to raise a fourth amendment challenge. Id. at 861.

³⁵⁶ *Couch*, 409 U.S. at 334 n.16 (citing *United States v. Guterma*, 272 F.2d 344 (2d Cir. 1959)). The court in *Guterma* focused on the lack of access to the safe as most significant—“if the company complied with the subpoena to its maximum ability by delivering the safe to the grand jury room, it will still be *Guterma* who will have to deliver his own papers.” *Guterma*, 272 F.2d at 346.

³⁵⁷ *Couch*, 409 U.S. at 333.

³⁵⁸ Id. at 334-35.

³⁵⁹ Id.

the records were held by an employee, the IRS considered that the employer had dominion over them and would subpoena only the employer.³⁶⁰ Second, an independent contractor, not the defendant, controlled the confidentiality of the documents.³⁶¹

Under the act-of-production analysis of *Fisher* and *Doe*, which destroyed the privacy rationale for the fifth amendment privilege for documents, the doctrine of constructive possession lacks constitutional foundation.³⁶² This may be seen by examining the examples provided by the Court in *Couch*. The fifth amendment claim would not be valid in any of them, because the witness would not be compelled to supply testimonial information by the act of production; indeed, in none would the witness be required to produce anything at all. In the final analysis, the availability of the privilege depends exclusively on possession by the party being compelled and incriminated. Despite the Court's contrary assertions, possession should be a per se requirement of the privilege, for without it there can be no personal compulsion.

The witness in *Couch* used the example of the third party served with a subpoena while helping the witness carry her briefcase across the street to demonstrate the absurdity of the government's position. But enforcing such a subpoena would in fact not violate the fifth amendment, in spite of the brevity of the witness' loss of control.³⁶³ The subpoena might be worded in two different ways. It

³⁶⁰ Id. at 334 n.18.

³⁶¹ Id. at 335. Under a property theory, the accountant's status as an independent contractor would void the privilege because the papers he produced would not belong to the witness. See *United States v. Slutsky*, 352 F. Supp. 1105, 1109 (S.D.N.Y. 1972).

³⁶² In *Fisher*, the Court recognized that if the documents were protected in the witnesses' hands under the fifth amendment, the attorney-client privilege would have protected them when possessed by one class of third parties, the witnesses' attorneys. See *Fisher v. United States*, 425 U.S. 391, 404-05 (1976). That result, however, was possible only because the transfer was protected by a recognized privilege. The defendants did not retain constructive possession of the papers, and the fact that the attorneys were agents of the taxpayers did not alter the result. Id. at 397-98.

³⁶³ Judge Friendly explained that this example, which he found wildly unrealistic, ran afoul of the Constitution because "any other conclusion would trivialize the privilege." In re Grand Jury Subpoena Served Upon Simon Horowitz, 482 F.2d 72, 86 (2d Cir.), cert. denied, 414 U.S. 867 (1973). Taking a different tack, the United States Court of Appeals for the Fifth Circuit argued that tying the privilege directly to possession "would swallow the privilege," because employers "would lose the privilege before the grand jury the moment they hired any employee whose functions would require access to records." In re Grand Jury Subpoena (Kent), 646 F.2d 963, 969 (5th Cir. Unit B June 1981). Both positions suffer from the same fundamental flaw. Whether simple or complicated, an "end run" on the privilege is

could command that the third party deliver the briefcase then in his possession. So worded, the subpoena would pass muster under the fifth amendment; indeed, a similarly worded subpoena could properly be enforced even if served directly upon the defendant, for having a visible briefcase in one's possession presents an obvious case of a foregone conclusion.³⁶⁴ By furnishing the briefcase, the holder does not identify it as belonging to him, so no communication is involved.³⁶⁵ Providing the briefcase to the government is surrender, not testimony.³⁶⁶ In the alternative, the subpoena could require the third party to select from papers in the briefcase certain ones belonging to the defendant. This subpoena would be equally valid, for no compulsion would be directed against the defendant, and no communication would be received from him.³⁶⁷

The second situation where the *Couch* Court suggested that the privilege might protect documents absent the actual possession involved custodial safekeeping. But production here would violate the fifth amendment only if the privilege were designed to protect privacy.³⁶⁸ Where the custodian has no right to inspect or use the

invalid only if it results in a substantive denial of constitutional rights. Where the *defendant* is not compelled to provide testimonial communications, the privilege is not violated under *Fisher* and *Doe*.

³⁶⁴ See *Fisher v. United States*, 425 U.S. 391, 411 (1976) (foregone conclusion analysis).

³⁶⁵ See *United States v. Stoecker*, 17 M.J. 158, 162 (C.M.A. 1984) (compliance with command to "give me the box" not testimonial); *supra* note 39 and accompanying text.

³⁶⁶ See *In re Harris*, 221 U.S. 274, 279 (1911).

³⁶⁷ See *In re Grand Jury Empanelled Feb. 14, 1978*, 597 F.2d 851, 860-61 (3d Cir. 1979).

In *In re Grand Jury Proceedings (Manges)*, 745 F.2d 1250, 1252 (9th Cir. 1984), the court gave an example of a subpoena it believed violated the fifth amendment under the constructive possession doctrine. Suppose that a janitor is served with a subpoena while moving a box of his employer's records. The court thought this a situation where, in the words of the Supreme Court, possession was so insignificant or fleeting "as to leave essentially unaltered the incriminating testimonial effects the act of production would visit upon the employer," and suggested that the subpoena "might command production in a way that would testimonially incriminate his employer who regularly exercised dominion over the records." *Id.*

Although the example may illustrate how the privilege can be trivialized, the employer would not have been subjected to compelled testimonial incrimination. See *supra* note 363. Perhaps the court supposed that the janitor's response could implicitly reflect communications from his employer. Perhaps he would be able to authenticate the records as belonging to the employer because of actions or statements he observed the employer make with regard to the box. Those communications, however, would not be privileged, and while implicitly provided by the act of production, like the preexisting documents contained in the box, they are not the product of any compulsion by the government. The fact that possession is relinquished only for a brief moment is constitutionally irrelevant.

³⁶⁸ See *United States v. Braswell*, 436 F. Supp. 669, 673 (E.D.N.C. 1977) ("[I]t is not clear that [the Court's] cautious suggestion of the possibility of an exception to the personal-

documents but only to store them, the witness' expectation of privacy remains intact. Ordering the custodian to produce the documents, however, places no more testimonial compulsion on the witness than occurs when the custodian examines and uses them without permission.³⁶⁹ The act of production involves no testimonial self-incrimination in either case.³⁷⁰

The Court's third example was *United States v. Guterma*,³⁷¹ where the witness maintained his records on corporate premises

compulsion criterion will bear up under further analysis, since it appears designed to protect an individual's justifiable expectation of privacy, a concern which the court later in *Fisher* sought to dissociate from the purpose and policy of the Fifth Amendment."); see also *In re Grand Jury Subpoena Served Upon Simon Horowitz*, 482 F.2d 72, 85 (2d. Cir.) ("[N]o Supreme Court decision has upheld a Fifth Amendment claim predicated solely, or even primarily, on the basis of an invasion of privacy . . ."), cert. denied, 414 U.S. 867 (1973).

³⁶⁹ Several federal circuit court cases have noted the custodian's access to or use of the documents as a factor in denying fifth amendment protection. See *United States v. Silvestain*, 668 F.2d 1161, 1162, 1165 (10th Cir. 1982) (constructive possession inapplicable to records in hands of accountant who had not actually examined them but who had power of attorney to deal with them); *United States v. Jones*, 630 F.2d 1073, 1080 (5th Cir. 1980) (no constructive possession where accountant had some knowledge of contents of records and was expected to use them in settling witness' tax liability); *In re Grand Jury Subpoena Served Upon Simon Horowitz*, 482 F.2d 72, 87 (2d. Cir.) (custodian's complete access to documents inconsistent with constructive possession), cert. denied, 414 U.S. 867 (1973).

Other cases where the third party, though an employee, has substantial duties in preparing and maintaining the records present even less basis for a constructive possession argument. See *In re Grand Jury Proceedings (Manges)*, 745 F.2d 1250, 1252 (9th Cir. 1984) (constructive possession absent where bookkeeper had exclusive responsibility for preparing and maintaining records); *In re Grand Jury Empanelled Feb. 14, 1978*, 597 F.2d 851, 862-63 (3d Cir. 1979) (no constructive possession where office manager prepared many of the records and had full access to them); *State v. Tsavaris*, 382 So. 2d 56, 67, 73 (Fla. Dist. Ct. App. 1980) (no constructive possession with regard to records subpoenaed from secretary who prepared and kept them), aff'd, 394 So. 2d 418 (Fla. 1981). But see *In re Grand Jury Subpoena (Kent)*, 646 F.2d 963, 966, 969 (5th Cir. Unit B June 1981) (sole proprietor who personally participated in office management maintained constructive possession of records subpoenaed from business comptroller who had access to them but did not exercise exclusive possession and control as against owner).

These two types of situations may be contrasted with the facts of *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969). There, because the witness worked nights, the records were transferred to an accountant's office for inspection by an IRS agent. The accountant "was not to process or use them in any way; he was simply their custodial bailee." *Id.* at 462. The decisive factor in the case, however, was the government's role in having the records transferred to the custodial bailee for its own benefit. As a result, the records were viewed as if still in the hands of the witness at the time the subpoena was served.

³⁷⁰ If the possessor could not identify the documents, the government might be forced to subpoena their "owner." Compulsion then would arise through direct operation of the second subpoena, rather than by virtue of the constructive possession doctrine.

³⁷¹ 272 F.2d 344 (2d Cir. 1959).

but kept them in a locked safe, to which only he and his co-defendant knew the combination. The corporation, which was served with the subpoena, could therefore not deliver the records themselves, but only the safe. Under these circumstances, the expectation of privacy was substantial.³⁷² More significantly, the witness had effectively denied others physical access to the records. This meant that the government had to exert some direct compulsion upon him to obtain them—namely, requiring him to provide the combination.³⁷³ The inquiry should then hinge on whether the witness' response would provide incriminating testimonial information.

Although the communicative content of providing the combination would be minor, in effect conveying only that the witness has access to that safe,³⁷⁴ it would nonetheless meet the demands of the testimonial requirement. The more significant question, however, is whether access is an issue in the case or a foregone conclusion that would eliminate the otherwise communicative character of that conduct. In *Guterman* itself, the witness freely admitted access and indeed ownership of the safe.³⁷⁵ Accordingly, even though the witness' expectations of privacy were clearly reasonable, the fifth amendment was not violated under the act-of-production doctrine of *Fisher* and *Doe*.³⁷⁶

³⁷² See *In re Grand Jury Empanelled Feb. 14, 1978*, 597 F.2d 851, 865 n.40 (3d Cir. 1979).

³⁷³ If, however, one presumes that under the fifth amendment the corporation could be required to deliver the safe to the courtroom, as the court in *Guterman* observed was all that it could physically do to comply with the subpoena, 272 F.2d at 346, the government could then obtain the records through the use of a safecracker. Neither delivery of the safe nor opening it would exert compulsion on the witness. Unless a private papers concept from *Boyd* protected the documents themselves, see *Couch*, 409 U.S. at 337 n.* (Brennan, J., concurring), the fifth amendment would not be violated by this process.

³⁷⁴ As discussed earlier, the fact that the government may gain possession of incriminating documents as a consequence of the witness' conduct is not testimonial. A witness must surrender items that he possesses if the government describes them with sufficient specificity. An order to produce the contents of "that" box, "that" safe, etc., does not implicate the fifth amendment even if its contents are contraband. See *supra* notes 80-81 and accompanying text.

³⁷⁵ *Guterman*, 272 F.2d at 345.

³⁷⁶ Cases holding that the witness may be required to sign an authorization for the release of foreign bank records provide support by analogy. See *In re United States Grand Jury Proceedings*, Western District of Louisiana (Cid), 767 F.2d 1131 (5th Cir. 1985); *United States v. Davis*, 767 F.2d 1025, 1039-40 (2d Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814, 816-19 (11th Cir.), cert. denied, 469 U.S. 932 (1984); *United States v. Browne*, 624 F. Supp. 245, 247-49 (N.D.N.Y. 1985). By signing the authorization, the witness is not indicat-

Eliminating constructive possession as a fifth amendment concept does not mean that the government can automatically obtain documents that the witness does not actually possess but in which he has a reasonable expectation of privacy. But the fifth amendment is not the appropriate vehicle for the protection of personal privacy. The fourth amendment is, after all, directly concerned with the protection of privacy. While its application to subpoenas is somewhat unclear, some showing of reasonableness would be required of a subpoena to obtain documents when the witness has maintained a reasonable expectation of privacy, especially if the documents are personal rather than business-related.³⁷⁷ In addition, general statutory and common law provisions limit the application of subpoenas to persons having the items under their actual control.³⁷⁸

ing his belief that such accounts exist or are controlled by him. Signing the form is not itself communicative, and demonstrates only that he can sign his name. And because of the explicit limitation of the court's order, see *Davis*, 767 F.2d at 1040, or because the witness is not competent to authenticate these records prepared by third parties, see *Ghidoni*, 732 F.2d at 818-19, a response by the bank producing the records cannot be used to prove his control.

Where the control of the safe is conceded or a foregone conclusion, providing its combination—like authorizing a third party to open a safe deposit box—operates just as the authorization in these cases. Where access is in issue, requiring the defendant to provide such communicative information as the combination, rather than simply signing his name, would violate the fifth amendment. But that is the very rare case.

³⁷⁷ See 1 S. Beale & W. Bryson, *supra* note 48, § 6:27, at 180 (1986); 2 W. LaFave, *Search and Seizure* § 4.13(e), at 207, 210-11 (1978). But see *United States v. Palmer*, 536 F.2d 1278, 1281-82 (9th Cir. 1976) (where subpoena properly limited in scope, not burdensome, and relevant, no fourth amendment violation occurs). Of course, unlike the fifth amendment, the fourth amendment would not provide complete protection against production. The documents could be obtained upon a showing of reasonableness or probable cause.

Whether an employee would be in a position to provide the records to the government against the interest of his employer might be judged by standards similar to those applied in evaluating the right of another to consent to a search. See W. LaFave and J. Israel, *supra* note 29, § 3.10(e), at 212. In cases such as *Guterman* and *Schwimmer*, efforts to maintain privacy would provide some measure of protection under the fourth, but not the fifth amendment.

³⁷⁸ See 5A J. Moore & J. Lucas, *Moore's Federal Practice* 45-30 (2d. ed. 1986); see also *In re Grand Jury Subpoena (Kent)*, 646 F.2d 963, 969 (5th Cir. Unit B June 1981) ("mere access" to documents does not give employee sufficient "possession, custody, or control" to comply with subpoena); *In re Grand Jury Subpoenas Served Upon Simon Horowitz*, 482 F.2d 72, 87 n.21 (2d Cir.) (government suggests the appropriate issue is whether the person served has sufficient control over the papers to warrant issuance of the subpoena to him), cert. denied, 414 U.S. 867 (1973).

The witness' retained control of items not in his actual possession may enable the third party to resist enforcement of the subpoena. Unlike the fourth amendment objection, which

IV. CONCLUSION

This article has developed a system for determining whether subpoenas that demand the production of documents and other tangible objects violate the fifth amendment. The system is simple in its basic nature. It requires few intricate doctrines and indeed is designed to eliminate the complex of secondary concepts and tests that are currently used by the courts. Instead, it depends upon a rigorous application of familiar fifth amendment principles to the process of producing documents.

Fisher and *Doe* eliminated separate treatment for the contents of documents and brought the law of subpoenas within the basic framework of the fifth amendment. The lower courts must now carry out the logic of the Supreme Court's position. The approach set forth in this article depends critically on courts taking seriously the fifth amendment principle that if conduct is testimonial and incriminating it is protected by the privilege against self-incrimination. The fundamental issues here are the same as they are when direct testimony is involved, and the analysis should be conducted in a similarly rigorous manner. When tough issues and difficult questions of interpretation arise, gimmicks and peculiar characterizations have no place.

As for existing doctrines, the artificial entities exception has no validity insofar as it denies the privilege to representatives of corporations, labor unions, and partnerships who may be personally incriminated by production of the organization's documents. The doctrine may provide a convenient set of solutions for an entire class of subpoenas, but it is fundamentally at odds with the basic policies of the privilege. Similarly, a number of the subtests involved in determining when records fall within this exception to the privilege, along with the constructive possession doctrine, should be eliminated as vestiges of abandoned fifth amendment theories.

Though simple in structure, the proposed method of analysis will require careful application by the lower courts. Determining whether a subpoena requires testimonial incrimination is often a

should properly be made by the witness who claims his privacy interests are being infringed, this objection belongs only to the person receiving the subpoena. See, e.g., *State v. Tsavaris*, 394 So. 2d 418, 425 (Fla. 1981) (party receiving subpoena must object to the form of process).

difficult question, and judging when issues are substantially in contest can likewise be challenging. Secondary doctrines that supply ready answers may be more easily applied, perhaps, but they lose sight of the critical variables and provide no promise of accurate results in close cases. The analysis set out in this article is demanding, but it identifies the critical issues that basic fifth amendment policy requires the courts to consider, and its application should help to bring some rationality to this troubled area of fifth amendment law.